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In The OFFICE OF THE CLERK
Supreme Court of the United States

TERRANCE HAYES, KAISER ALUMINA AND CHEMICAL CORPORATION, AXA GLOBAL RISKS (U.K.), ET AL.,

Petitioners,

v.

THOMAS AND BETTS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Counsel for Kaiser/AXA:
CALEB H. DIDRIKSEN,
La. Bar No. 1334
Counsel of Record
DIDRIKSEN LAW FIRM
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Counsel for Terrance Hayes:
WALTER DUMAS,
La. Bar No. 5163
DUMAS & ASSOCIATES LAW CORP.
The Lawyers Complex
1261 Government Street
Baton Rouge, Louisiana 70821
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A power outage led to an explosion at an aluminum processing plant in Gramercy, Louisiana, and the Petitioners sustained more than $500 million in damages. The case was tried by a jury, and the trial court, recognizing the numerous errors that occurred at trial, vacated the jury verdict and granted a judgment notwithstanding the verdict and new trial in favor of Petitioners. This JNOV ruling was reversed on appeal, and Petitioners attempted to appeal the jury verdict – the only judgment on the merits in this case. The appellate court initially dismissed the Petitioners' appeal of the jury verdict as premature, until the trial court rendered a new judgment incorporating the jury verdict. After the trial court complied with the order and entered a judgment incorporating the jury verdict, the same appellate court denied Petitioners' appeal, and ruled that such an appeal was barred on the basis of res judicata. The questions presented are as follows:

1. Whether a judgment notwithstanding the verdict which vacates a jury's verdict and is later reversed prevents any appeal of the jury's verdict?

2. Whether Petitioners' right to appeal as guaranteed under Louisiana law and whether Petitioners' due process rights as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution were violated when the

QUESTIONS PRESENTED – Continued

Louisiana Fifth Circuit Court of Appeal denied Petitioners' appeal of the reinstated jury verdict?

LIST OF ALL PARTIES AND COUNSEL

For Applicants:

DUMAS & ASSOCIATES LAW CORPORATION
Walter Dumas, La. Bar No. 5163
The Lawyers Complex
1261 Government Street
P.O. Box Office 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Counsel for Terrance Hayes

Didriksen Law Firm
Caleb H. Didriksen, La. Bar No. 1334
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Counsel for:

AXA GLOBAL RISKS (U.K.),
ALLIANZ INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
COMPAGNIE TRANSCONTINENTALE DE REASSURANCE,
HOUSTON CASUALTY COMPANY,
LEXINGTON INSURANCE COMPANY,
MUNICH REINSURANCE COMPANY,

LIST OF ALL PARTIES
AND COUNSEL – Continued

NATIONAL UNION FIRE INSURANCE COMPANY,
QATAR INSURANCE COMPANY,
Q.B.E. INTERNATIONAL INSURANCE, LTD.,
SOREMA INSURANCE COMPANY,
SWISS REINSURANCE COMPANY,
WINTERTHUR INTERNATIONAL INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

For Respondents:

ADAMS & REESE
Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Facsimile: (504) 566-0210

GIEGER, LABORDE & LAPEROUSE, LLC
Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
4800 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 561-0400
Facsimile: (504) 561-1011

LIST OF ALL PARTIES AND COUNSEL – Continued

SESSIONS, FISHMAN & NATHAN, LLP
Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
201 St. Charles Ave., 35th Floor
New Orleans, Louisiana 70170-3500
Telephone: (504) 582-5200
Facsimile: (504) 582-1555

Counsel for Thomas & Betts

CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are identified in the caption of the case. Petitioner Kaiser Aluminum and Chemical Corporation filed for bankruptcy and was dissolved in 2002. Prior to bankruptcy, Maxxim, Inc. was the parent company of Kaiser Aluminum and Chemical Corporation. Certain Underwriters at Lloyd's, London is not a corporation, but an insurance market made up of members. Qatar Insurance Company is a privately held company. The parent corporations to the remaining insurers listed as Petitioners are as follows:

1. AXA Reinsurance S.A. is the parent company of Petitioner AXA Global Risks (U.K.).

2. Allianz Group is the parent company of Petitioner Allianz Insurance Company.

3. Fairfax Financial Holdings Ltd. is the parent company of Petitioner Houston Casualty Company.

4. American International Group, Inc., is the parent company of National Union Fire Insurance Company of Pittsburgh, which is the parent company of Petitioner Lexington Insurance Company.

5. Munich Re Group (Germany) is the parent company of Petitioner Munich Reinsurance Company.

CORPORATE DISCLOSURE STATEMENT – Continued

6. Q.B.E. Insurance Group Ltd. is the parent company of Petitioner Q.B.E. International Insurance, Ltd.

7. Caisse Centrale des Assurances Mutuielles Agricole (Groupama) is the parent company of Petitioner Sorema Insurance Company.

8. Employers Reinsurance Corp. and Schweizerische Ruckversicherungs-Gesellschaft is the parent company of Petitioner Swiss Reinsurance Company.

9. AXA Group is the parent company of Petitioner Winterthur International Insurance Company.

10. Swiss Reinsurance Company (Zurich) is the parent company of Petitioner Zurich Reinsurance Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Terrance Hayes ("Hayes"), Kaiser Alumina and Chemical Corporation, and its property insurers ("Kaiser/AXA") respectfully petition this Court for a writ of certiorari to preserve their constitutional right to appeal by requesting review the judgment of the Louisiana Fifth Circuit Court of Appeal in this case.

OPINIONS BELOW

The Louisiana Fifth Circuit Court of Appeal's grant of T&B's writ and reversal of Petitioners' motion for a new trial issued on January 30, 2008 was unreported and is attached as Appendix 1, and ruled that res judicata prevents any appeal. The decision of the Louisiana Supreme Court denying writs and dissent by Chief Justice Calogero was unreported and is attached as Appendix 76. The decision of the Louisiana Supreme Court denying rehearing and Chief Justice Calogero's dissent is reported at *In re Gramercy Plant Explosion at Kaiser*, 2008-0481 (La. 06/20/08), 982 So. 2d 763 and is attached as Appendix 78.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(c). The Louisiana Fifth Circuit Court of Appeal issued its opinion on January 30,

2008, which reversed the trial court's grant of a new trial and denied Petitioners' right to appeal the reinstated jury verdict, and is reprinted at Appendix 1. The Louisiana Supreme Court denied Petitioners' writ application on May 2, 2008, and denied Petitioners' request for rehearing on June 20, 2008, and are reprinted at Appendices 76 and 78. The final judgment of the trial court is unreported and reprinted at Appendices 7 and 16.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution guarantees citizens due process and equal protection, including a right to appeal where a state guarantees that right by providing a procedure for appellate review. The Louisiana Supreme Court failed to correct the errors of the Louisiana Fifth Circuit Court of Appeal when it erroneously denied Petitioners' writ, which violated Petitioners' right to appeal as guaranteed by Louisiana constitutional, statutory, and case law. The denial of Petitioners' right to appeal conflicts with the Due Process and Equal Protection provisions of the Fifth and Fourteenth Amendments of the United States Constitution, in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

This case began with a massive short circuit and explosion at the Kaiser Gramercy aluminum plant in Louisiana on July 5, 1999. The explosion injured thousands of people, including applicant Terrance Hayes, who was blinded and severely burned by superheated lye solution. The Kaiser Alumina and Chemical Corporation and its property insurers ("Kaiser/AXA") sustained nearly half a billion dollars in losses. The short circuit was caused by a failure of adhesive backed mounts which were designed, manufactured, and sold by the Thomas and Betts Corporation ("T&B"). The T&B mounts failed in normal service and allowed a low voltage instrument line to contact an 8,000 volt bus bar. A short circuit ensued, which in turn caused the power failure at the Kaiser plant and a massive explosion. The Kaiser workers, searching in the dark, were unable to find the source of the power outage in time to avoid the explosion.

The matter was tried to a jury, and the jury failed to assign fault to T&B, despite T&B's admissions during trial that without the electrical outage, no explosion would have occurred. The trial court acknowledged the errors that occurred during trial, vacated the jury verdict and granted judgment notwithstanding the verdict and conditional new trial in favor of Kaiser/AXA and Hayes. The trial court assessed Kaiser/AXA's losses at $335,000,000, Hayes' losses at $20,000,000, and allotted 25% of the fault to T&B, which resulted in a judgment of $88,750,000 plus interest and costs against T&B, for a total judgment of

more than 120 million dollars. T&B appealed, and the Louisiana Fifth Circuit Court of Appeal ("Fifth Circuit") reversed the JNOV and conditional new trial in 2006 and reinstated the jury verdict. After the Fifth Circuit reversed the trial court's JNOV and conditional new trial and reinstated the jury verdict, Kaiser/AXA and Hayes attempted to appeal the reinstated jury verdict, but the Fifth Circuit dismissed their appeal as premature. Subsequently, Petitioners were denied any right to appeal the jury's verdict, which was vacated by the trial court's JNOV. The Louisiana Supreme Court declined review of the Fifth Circuit's decision, but Chief Justice Calogero's dissenting opinion recognized the violation of the Petitioners' right to appeal:

> While the law appears not to be entirely clear on when an appeal on the merits may be taken after a JNOV and new trial are granted, but those rulings are later reversed and the jury verdict reinstated by the court of appeal, I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict. Furthermore, the cases that come close to addressing the issue either tend to support the Petitioners' position or are inconclusive. *Junot v. Morgan*, 01-0237 (La. App. 1 Cir. 2/5/02), 818 So. 2d 152, would favor the case being remanded to the district court to enter a judgment pursuant to the jury verdict and permit further proceedings, including an appeal therefrom. And this court in

Vasalle v. Wal-Mart Stores, Inc., 01-0462 (La. 11/28/01), 801 So. 2d 331, after reversing the JNOV and new trial order, simply reinstated the jury verdict, without any instruction to the district court; therefore, this court in *Vasalle* did not address whether an appeal on the merits might lie from the reinstated jury verdict.[1]

REASONS FOR GRANTING THE PETITION

Few aspects of American civil procedure are as deeply ingrained as a party's right to appeal. While this Court has long held that there is no "right" to appeal in the Constitution, it has held that where a state provides a process of appellate review, those procedures must comport with the constitutional guarantees of due process and equal protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Louisiana guarantees the fundamental right to appellate review through its constitution, statutes, and case law.

Petitioners have been denied their Constitutional right to due process and equal protection through appeal as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. U.S. Const. amend. V, XIV. These amendments guarantee due process by the federal and state

[1] App. 76.

governments, and afford (in pertinent part) that its citizens shall not "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, XIV. This case warrants the extraordinary remedy of appellate review by this court, as the lower courts' judgments have effectively denied the Petitioners' right to appeal an adverse jury verdict as otherwise accorded under Louisiana law, without notice and an opportunity to be heard in a case worth more than a half billion dollars. This is a case of first impression in any American jurisdiction, as Petitioners have located no authority that reversal of a judgment notwithstanding the verdict without a full review of a jury trial record operates as a final judgment that eliminates the right of the Petitioners to subject the merits of the jury verdict to appellate review.

ARGUMENT

I. The jury verdict was so defective in this case that the trial court granted a JNOV and a new trial twice. The appellate court, which has never reviewed the jury trial under applicable standards, has denied Petitioners' right to appellate review because it reversed the trial court's JNOV.

The Fifth Circuit's dismissal of Kaiser/AXA's appeal in accordance with the principle of res judicata and the Louisiana Supreme Court's denial of writs on the matter amounts to a denial of Petitioners' due process. The jury verdict, which is the only judgment

on the merits in this case, has never been appealed. The Fifth Circuit has ruled that there will never be an appeal. App. 1. When the trial court granted JNOV, that JNOV vacated the jury verdict, and thus it could not be appealed unless and until the jury verdict was reinstated. When the Fifth Circuit reversed the JNOV and reinstated the jury verdict, Kaiser/AXA filed an appeal of the reinstated jury verdict. App. 79. The Fifth Circuit dismissed this appeal as *premature*, ruling that the trial court had not signed a judgment that incorporated the jury verdict, and thus, there was no judgment to appeal. App. 22. Once the trial court signed a judgment incorporating the jury verdict, Kaiser/AXA and Hayes filed a motion for a new trial, which was granted. App. 7. The Fifth Circuit then reversed its earlier judgment, and stated that the JNOV reversal functioned to make the judgment of the jury acquire the "authority of the thing adjudged" under the principle of res judicata, and indicated that the judgment was "not subject to modification, revision or reversal on the issue of the new trial, or any other issue." App. 1. Kaiser/AXA and Hayes were denied the right to appeal the reinstated jury verdict.

II. The Louisiana Supreme Court and Fifth Circuit erred when both courts denied Petitioners' leave to appeal the reinstated jury verdict, which was previously vacated by the trial court's judgment notwithstanding the verdict.

A. Res judicata is not a bar to appellate review of the reinstated jury verdict.

Res judicata is a well-litigated topic that requires a final judgment on the merits as a bar to repeat litigation. La. R.S. § 13:4231 cmt. (d) (2008), *Tolis v. Bd. of Supervisors of Louisiana State Univ.*, 95-1529 (La. 10/16/95), 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841 (2008). There has never been an appeal of any judgment incorporating the jury verdict herein, which is the only judgment on the merits in this case. Nonetheless, the Fifth Circuit concluded that there is no right to appeal. App. 1. In January 2008, the Fifth Circuit ruled that its 2006 judgment that reversed the JNOV and reinstated the jury verdict was a final judgment that decided the merits of the case. *Id., citing Tolis*, 95-1529, 660 So. 2d 1206. In *Tolis*, the Louisiana Supreme Court held that the appellate court's dismissal of the plaintiff's action in its entirety *with prejudice* decided the *merits* of the case, and operated as a final judgment subject to res judicata and was conclusive between the parties. *Id.* In the present case, there has never been a dismissal with prejudice that survived a post-trial motion, which is much different than *Tolis*.

There is no case or statutory authority for the proposition that the Fifth Circuit's reversal of the trial court's JNOV and reinstatement of the jury verdict operates as a final decision on the merits of the jury verdict. A nationwide jurisprudence search reveals no case or statutory authority that a reversal of a JNOV operates as a final decision that decides the merits of a vacated jury verdict and the JNOV reversal eliminates any right of appeal of the jury verdict.

Pursuant to Louisiana law, when the Fifth Circuit reviewed the JNOV, it examined the evidence in the light most favorable to T&B in reaching its conclusion to reverse the JNOV and reinstate the jury verdict. *In re Gramercy*, 04-1151, 927 So. 2d at 498. Upon reviewing the trial court's JNOV, the Fifth Circuit acknowledged that as a reviewing court, it applied the standard of review for JNOV. *Id.* The Fifth Circuit did *not* consider the merits of the case to decide if the jury's verdict was *correct*, but only whether the JNOV was properly granted. *Id.*

The Fifth Circuit most recently cited *Avenue Plaza, L.L.C. v. Falgoust* for several principles underlying the concept and use of res judicata. App. 1, *citing* 96-0173 (La. 7/2/96), 676 So. 2d 1077. *Avenue Plaza* is distinguishable from the present case because it involved two separate lawsuits: one that was complete, followed by a separate case that was filed, regarding the legal effect of an unrecorded lease between two parties. *Id.* at 1079. The principles articulated in *Avenue Plaza* and res judicata are

inapplicable to this case. The reversal of the trial court's grant of the JNOV, while final as to the JNOV, is not a judgment on an appeal of the jury verdict, which has never been appealed. The merits of the jury's verdict have never been the subject of an appeal or a final judgment. Thus, the Fifth Circuit should not bar Petitioners from appealing the only judgment on the merits in this case – the judgment incorporating the jury's verdict, which was previously vacated by the JNOV. Vacated judgments are not appealable.

Claim preclusion and issue preclusion operate only on final judgments to bar relitigation of claims that could have been raised in a prior proceeding, and issues that were raised in a prior proceeding. *See Terrebonne Fuel & Lube v. Placid Ref. Co.*, 95-0654, (La. 01/16/96), 666 So. 2d 624, 632. An application of issue preclusion presupposes that the substance of the issue precluded was addressed in prior litigation and embodied in a final judgment on the merits, while an application of claim preclusion bars a second action if it arises out of the same occurrence which was the substance matter of the prior litigation. *Terrebonne*, 95-0654, 666 So. 2d at 634. The Louisiana Supreme Court has held that the doctrine of res judicata is triggered only by final judgments on the merits. *Tolis*, 95-1529, 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841. Neither of these doctrines apply at this time to this litigation, as the only judgment on the merits in this case – the jury's verdict – has never been subject to appellate review.

B. The Fifth Circuit first dismissed Petitioners' appeal of the reinstated jury verdict as premature, and then erroneously denied the appeal on the basis of res judicata.

Inexplicably, the Fifth Circuit's most recent opinion that denies Petitioners' appellate rights omits and does not cite its significant prior ruling that it rendered on January 16, 2007, which deemed Petitioners appeal *premature* for failure of the trial court to enter a new judgment incorporating the jury verdict. App. 22. The Louisiana Supreme Court denied Petitioners' writ application regarding the Fifth Circuit's reversal of the trial court's JNOV on June 14, 2006, which the Fifth Circuit correctly identified as a final judgment – as to the JNOV. App. 74. Kaiser/AXA filed a motion for a devolutive appeal on August 9, 2006, within the 60-day time limit accorded to devolutive appeals under La. Code Civ. Proc. art. 2087 (2008). App. 79. T&B filed a motion to dismiss this appeal and argued that the appeal was barred by res judicata, pursuant to the judgment rendered by the Fifth Circuit that reversed the trial court's JNOV on March 28, 2006. App. 25. The Fifth Circuit granted T&B's motion to dismiss the appeal, but on different grounds. App. 22. The Fifth Circuit dismissed the appeal as premature, and held that the trial court had not yet entered an order adopting the jury verdict after the Fifth Circuit's reversal of its JNOV. App. 22. The Fifth Circuit held that there was no final judgment for Kaiser/AXA to appeal, and thus the Fifth

Circuit was without jurisdiction to lodge Kaiser/AXA's appeal. App. 22. The Fifth Circuit noted that this could be remedied by motioning the trial court to enter a final judgment on the jury verdict. App 22. The Louisiana Supreme Court then denied T&B's writ which requested a ruling that the case was concluded and that no additional trial or appellate jurisdiction existed. App. 20.

Kaiser/AXA heeded the Fifth Circuit's instruction to obtain a final judgment from the trial court that incorporated the jury's verdict. On September 4, 2007, after holding a hearing and consulting with all parties about the final form of judgment, the trial court signed a final judgment incorporating the jury verdict, the form of judgment presented to the trial court by T&B. App. 16. In accordance with the rules governing post trial motions, Kaiser/AXA and Hayes filed motions for a new trial and a change of venue. The trial court granted the motion for a new trial on discretionary grounds, due to the errors and irregularities that occurred at trial. App. 7.

T&B filed an application for supervisory writs to the Fifth Circuit, which reversed the trial court's grant of a new trial. App. 1. However, the language in the Fifth Circuit's opinion indicates that the Fifth Circuit not only reversed the grant of a new trial, but also intended to foreclose Petitioners' right to appeal the jury verdict. App. 1. In the Fifth Circuit's opinion, it states that it did not remand the case after reversing the JNOV "for the trial judge to render and sign judgment on the jury verdict, allowing further

proceedings *or appeals* as provided by law." App. 1 (emphasis added), *citing Cf. Junot v. Morgan*, 01-237 (La. App. 1 Cir. 2/20/08), 818 So. 2d 152. Instead, the Fifth Circuit ruled that as of June 14, 2006, the jury's verdict "acquired the authority of the thing adjudged and was not subject to modification, revision, or *reversal* on this issue, or *any other issue*." App. 1 (emphasis added).

As the Fifth Circuit clearly intended to foreclose all future litigation in this matter under the principles of res judicata, including any appeal of the jury's reinstated verdict, it committed an egregious error. Res judicata is only triggered by *final judgments on the merits*. La. R.S. § 13:4231 cmt. (d) (2008), *Tolis*, 95-1529, 660 So. 2d 1206, *citing* La. Code Civ. Proc. art. 1841 (2008). The merits of the jury's verdict have never been addressed by the Fifth Circuit. T&B's appeal of the JNOV was not a consideration of the merits of the jury verdict, which were not available for review, as it had been vacated by the JNOV. *Junot v. Morgan*, 2002-0237, 818 So. 2d at 156-57.

C. Vacated jury verdicts are not appealable until reinstated by the trial court.

In *Junot*, the defendant tried to suspensively appeal both the JNOV and the vacated jury verdict at the same time. *Junot*, 2002-0237, 818 So. 2d at 156. The First Circuit ruled that an appealing party could not seek review of both a jury's verdict and a JNOV rendered under Louisiana Code of Civil Procedure

article 1811(E), because the JNOV *replaced* the jury's verdict. *Junot*, 2002-0237, 818 So. 2d at 156-57. Thus, the First Circuit dismissed the defendant's appeal of the jury's verdict as premature, because the judgment was "set aside" by the JNOV verdict. *Id.* The First Circuit ruled that prematurely considering an appeal of a judgment of a set aside verdict at the same time it reviews a JNOV will have "the potential effect of terminating the *post-judgment rights* of the parties, *for example*, the right to a new trial ruling in the trial court under *La. C.C.P. art. 1811E.*" *Id.* (emphasis added). The crux of *Junot* is that when a JNOV is granted, the jury's verdict is set aside. *Id.* Therefore, it follows that a party cannot appeal both a jury verdict and a JNOV because the JNOV effectively vacates the jury verdict. A party cannot appeal a vacated judgment. The opportunity to appeal the jury verdict did not arise until the Fifth Circuit had reinstated the jury verdict after it reversed the JNOV and when the Louisiana Supreme Court denied writs as to the Fifth Circuit's reversal of the JNOV. Kaiser/AXA attempted to appeal the jury verdict after this occurred, and the Fifth Circuit dismissed the appeal as premature, and noted that there was no judgment from the trial court that incorporated the jury verdict. App. 22. Once the trial court signed the judgment that incorporated the jury verdict, Petitioners had the statutory right to file

post-trial motions on that judgment.[2] App. 16. Only after the post-trial motions were disposed of could Petitioners appeal the jury verdict. The ramifications of the Fifth Circuit's most recent application of res judicata which holds that the reversal of the JNOV is a final judgment triggering res judicata results in ridiculous outcomes. This trial was so fraught with error that the trial judge granted a JNOV and two new trials. Once confronted with the appeal of the jury's verdict, the appellate court simply disallowed any appellate review of the only judgment on the merits in this matter (jury's verdict), simply because the Petitioners won a JNOV that was later reversed.

Chief Justice Calogero dissented from the Louisiana Supreme Court's majority decision that denied review of the Fifth Circuit's opinion. App. 76. He wrote separately to caution the majority that the Louisiana Supreme Court and Fifth Circuit effectively violated the Petitioners' right to appeal an adverse jury verdict, and noted that no appellate court had yet examined the merits of the jury verdict. App. 76. He opined that he would grant writ in this matter "to permit further proceedings, including an appeal therefrom." App. 76. Justice Calogero also reasoned that the Louisiana Supreme Court had not addressed whether an appeal from the merits would lie from a reinstated jury verdict, and noted that the

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[2] No specific provisions in Louisiana law prohibit a trial court from granting a second new trial. *Carlone v. Carlone*, 444 So. 2d 1274, 1276 (La. App. 4 Cir. 1984).

cases that came close to addressing the issue either tended to support Kaiser/AXA's position or were inconclusive, which provided sufficient grounds to grant writ. App. 76.

The Fifth Circuit chose to ignore precedential law from its sister circuit, the Louisiana Supreme Court declined the opportunity to resolve the split in circuits, and the ensuing decision denied Petitioners' right to appeal. Other states follow the rule of *Junot* that a jury verdict is procedurally held in abeyance upon grant of a JNOV, making any appeals of the jury verdict premature unless and until the jury verdict is reinstated. The Fifth Circuit has not yet considered the merits of this case, and its latest decision refuses to consider Kaiser/AXA's appeal, which is guaranteed under Louisiana law.

III. Other jurisdictions embrace similar rules regarding JNOVs and vacated jury verdicts as enunciated by the Louisiana First Circuit Court of Appeal in *Junot v. Morgan*.

A. California: *Lippert v. Avco Community Developers, Inc.*

California also follows a rule similar to *Junot*. In *Lippert v. Avco Community Developers, Inc.*, the court held that when a JNOV is reversed on appeal, the reinstated judgment on the verdict is a new judgment for the purposes of appeal. 60 Cal. App. 3d 775, 779 (Cal. Ct. App. 1976). In *Lippert*, the jury returned a

verdict against the defendants, and the trial court granted the defendants' motions for JNOV and new trial. *Lippert*, 60 Cal. App. at 777. Plaintiffs appealed, and the appellate court reversed the JNOV and new trial, and reinstated the jury verdict. *Id.* Defendants filed a notice of appeal on the jury verdict, and plaintiffs filed a motion to dismiss, contending that the appellate court lacked jurisdiction to hear the appeal. *Id.* The plaintiffs argued that the defendants' appeal was untimely, and that the defendants should have filed a cross-appeal at the time that the plaintiffs appealed the JNOV and new trial. *Lippert*, 60 Cal. App. at 778.

The appellate court noted that rather than appealing the jury verdict at the time it was rendered, the defendants chose to pursue relief in the trial court by filing post-trial motions for JNOV and new trial. *Id.* at 777. The appellate court noted that the defendants' actions of filing these post-trial motions were not only understandable, but commendable because compared to an appeal, post-trial court remedies are quicker and involve less time and money to file. *Id.* The appellate court noted that if the JNOV and new trial were denied, the defendants would have been able to file a timely notice of appeal. *Id.* Because the trial court granted the JNOV, defendants *could not* have taken the precautionary cross-appeal as urged by the plaintiffs, *because the jury verdict was vacated by the JNOV, and no appeal lies from a vacated judgment. Lippert*, 60 Cal. App. at 777-78 (emphasis added), *citing Lantz v. Vai*, 199 Cal. 190, 190 [248 P. 665] (Cal. 1926); *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 345 [87 Cal. Rptr. 226]

(Cal. Ct. App. 1970); *Hozz v. Felder*, 167 Cal. App. 2d 197, 201 [334 P.2d 1590] (Cal. Ct. App. 1959).

The appellate court's review of California rules did not yield an explicit provision that mandated that a party must cross-appeal at the same time a JNOV is appealed. *Lippert*, 60 Cal. App. at 778. The court further held:

> [W]e can conceive of no justification for allowing a cross-appeal where both judgment notwithstanding the verdict and, in the alternative, new trial have been granted, but denying it where the judgment notwithstanding the verdict has been granted but a new trial has been denied. *This would surely be a case of the tail wagging the dog.*

Id. (emphasis added). The appellate court also held that until the JNOV was reversed, "nunc pro tunc reinstatement of the judgment on the verdict would result in a complete denial of defendant's right to appeal from that judgment." *Id.* at 779. The *Lippert* court concluded that the right of appeal is favored by the courts and appellate rules are to be construed to preserve that right. *Lippert*, 60 Cal. App. at 779.

Petitioners have suffered the same denial of their right to appeal herein as the defendants in *Lippert*. Instead of appealing the jury verdict when it was originally rendered, Petitioners chose to pursue post-trial relief by filing motions for a JNOV and new trial. Like the *Lippert* defendants, Petitioners could not file a cross-appeal of the jury verdict at the time that T&B appealed the JNOV, as the JNOV vacated

the jury verdict. If the trial court had originally denied the JNOV, Petitioners would have been allowed to appeal the jury verdict. Why should a JNOV that is won and later reversed on appeal and the reinstated jury verdict be any different?

B. Michigan: *Cox v. Board of Hospital Managers for the City of Flint*

The Michigan Supreme Court addressed this issue in *Cox v. Bd. of Hosp. Managers for the City of Flint*, 651 N.W.2d 356 (Mich. 2002). In *Cox*, the jury awarded the plaintiff $2.4 million for the damages he suffered as a result of the defendant's medical malpractice. *Id.* at 359. Defendant moved for a JNOV, new trial, or remittitur. *Id.* The trial court ruled that it would grant the defendant's motion for a new trial unless the plaintiff accepted a remittitur of $750,000. *Id.* The plaintiff appealed. *Id.*

The appellate court ordered the trial court to provide a detailed opinion as to the basis of its remittitur. *Cox*, 651 N.W.2d at 359. The trial court then reversed its prior grant of remittitur and granted the defendant's motion for JNOV. *Id.* The plaintiff again appealed. *Id.*

The appellate court reversed the JNOV and reinstated the jury verdict, and held that there was sufficient evidence of negligence to support the jury verdict. *Cox*, 651 N.W.2d at 359. The defendant then filed a cross-appeal of the jury verdict, and the appellate court dismissed defendant's appeal, noting that

the defendant had not submitted a copy of the trial court's order. *Cox*, 651 N.W.2d at 359. The trial court then vacated its order granting defendant's JNOV and reinstated the jury verdict. *Id.*

The defendant then appealed, and the appellate court dismissed the defendant's appeal, and held that the defendant's appellate issues were not preserved because it failed to file a cross-appeal from the original trial court order. *Cox*, 651 N.W.2d at 359. The dissent noted that the majority failed to understand that after the trial court granted the JNOV, the JNOV vacated the jury verdict, and could not be appealed as of right. *Id.*

> Simply put, there was no right (or requirement) to appeal (or cross appeal) the 1994 judgment during the period that it was vacated by the grant of new trial, remittitur, and JNOV. As such, defendant was not required or permitted to appeal as of right the 1994 judgment until after this Court's decision in *Cox* and after the trial court's order reinstating the judgment.

Cox v. Bd. of Hosp. Managers for the City of Flint, 620 N.W.2d 859, 876 (Mich. Ct. App. 2000), *citing* unpublished opinion per curiam, issued April 6, 1999 (Docket No. 205025).

The defendant then appealed to the Michigan Supreme Court, which vacated the appellate court's dismissal of the defendant's appeal. *Cox*, 651 N.W.2d at 359-60, *citing Cox*, 613 N.W.2d 719 (Mich. 2000).

On remand, the appellate court affirmed its dismissal, and one judge dissented. *Id.*, *citing Cox,* 620 N.W.2d 859 (Mich. 2000). The Michigan Supreme Court initially denied defendant's application for leave to appeal, then granted it upon defendant's motion for reconsideration, thus granting the defendant the right to appeal which had been denied by the appellate court. *Id.*, *citing Cox,* 639 N.W.2d 805 (Mich. 2002).

The procedural posture of *Cox* is similar to the present case. As in *Cox*, the trial court granted a JNOV, which effectively vacated the jury verdict. *Cox*, 651 N.W.2d at 359. The appellate court denied defendant the right to appeal the jury verdict, which was reversed by the Michigan Supreme Court. *Id.* at 360. Thus, the Michigan Supreme Court agreed with the appellate court dissent, which held that the defendant was not obligated to file a cross-appeal at the time the JNOV vacated the jury verdict. *Cox*, 651 N.W.2d at 360.

IV. Denial of Kaiser/AXA's right to appeal the reinstated jury verdict amounts to a denial of due process and equal protection.

"Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985), *quoting Bd. of Regents v. Roth*, 408

U.S. 564, 577 (1972). For the purposes of due process, "liberty" and "property" have a descriptive definition based on state law, and a normative definition based on federal law. L. Tribe, *American Constitutional Law*, § 10-5 (1978). The basic foundations of procedural due process, the right to notice and the opportunity to be heard in a reasonable time and manner, have achieved constitutional dimension. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). However, other elements of procedure, such as the right to appeal, are "made up of values that are not elements of ordered liberty in the due process sense, but nevertheless are basic and traditional." Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, Mich. L. Rev. 797, 802-03 (1971). Appellate review is now an integral part of proper adjudication of claims. "The right to appeal, while never held to be within the Due Process guaranty of the United States, is a fundamental element of procedural fairness as generally understood in this country." ABA Comm'n on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.10 commentary at 14 (1977).

A civil plaintiff's victory deprives a defendant of liberty or property, and a civil defendant's victory deprives a plaintiff of the plaintiff's property right in its claim. John Leubsdorf, *Article: Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 587 (1984). This Court has held that a cause of action is a type of property right that is protected by the Due Process Clause of the Fourteenth Amendment. *Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 428, n.4 (1982), *citing Martinez v. California*, 444 U.S. 277, 281-82 (1980). The Due Process Clause provides that substantive rights such as life, liberty, and property cannot be divested unless pursuant to constitutionally adequate procedures. *Loudermill*, 470 U.S. at 539.

> The categories of substantive and procedure are distinct . . . "[p]roperty" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Loudermill, 470 U.S. at 540, *citing Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part), *see id.* at 185 (White, J., concurring in part and dissenting in part). "[The] adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Vitek v. Jones*, 445 U.S. 480, 490-91, n.6 (1980), *quoting Arnett*, 416 U.S. at 167. Once a court determines that the Due Process Clause applies, "the question remains what process is due." *Loudermill*, 470 U.S. at 540, *citing Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

This Court has upheld due process requirements for state-created rights not found in the federal constitution. In *Goss v. Lopez*, this Court ruled that while the federal constitution did not provide a fundamental right to education, when the state of Ohio chose to provide the right to public education, Ohio was bound by the comports of due process to provide students with a hearing before suspending them. 419 U.S. 56 (1975). "Having chosen to extend the right of education, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

CONCLUSION

The Louisiana Constitution guarantees the right of appeal, and Louisiana courts favor the right of appeal. *Succession of Damico*, 109 So. 402 (La. 1925), *citing* La. Const. art. VII §§ 29, 48 (1921), *Succession of Tullier*, 216 La. 821, 824 (La. 1950), *citing State ex rel. Durand v. Parish Judge*, 30 La. Ann. 282 (La. 1878), *First Nat'l Bank of Ruston v. Lagrone*, 164 La. 907, 114 So. 832 (La. 1927), *Pool v. Gaudin*, 207 La. 403, 21 So. 2d 424 (La. 1945). Once a final judgment is rendered in a case in which appeal is allowed by law, that party is entitled to an appeal as a matter of right. *Id.*, *see also Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 176 So. 2d 425,

432 (La. 1965), *Taylor v. Taylor Builders, Inc. v. Moore*, 393 So. 2d 792, 793 (La. App. 1 Cir. 1981), *Burton v. Hinton*, 426 So. 2d 192, 193 (La. App. 1 Cir. 1982). The appeal of a final judgment is not a matter of grace, but a matter of right, and as it is favored by Louisiana law, the right to appeal should be maintained whenever possible. *Id.*

Louisiana provides a process of appellate review in the Louisiana Code of Civil Procedure. La. Code Civ. Proc. Ann. art. 2082 (2008). "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Griffin*, 351 U.S. at 38-39 (Harlan, J., dissenting). Due process concerns are implicated when a state implements a system of appeals as of right but refuses to offer each defendant a fair opportunity to obtain adjudication of the merits of his appeal. *Evitts v. Lucy*, 469 U.S. 387, 405 (1985) (Rehnquist, J., dissenting). "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." *Evitts*, 469 U.S. at 400-01. Because Petitioners have the right to appeal the reinstated jury verdict that was previously vacated by the trial court's JNOV, Petitioners' appeal and the trial court's judgment

of September 4, 2007 should be reinstated for further proceedings in accordance with law.

Respectfully submitted,

DIDRIKSEN LAW FIRM
CALEB H. DIDRIKSEN, La. Bar No. 1334
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Attorney for:
AXA Global Risks (U.K.),
Allianz Insurance Company,
Certain Underwriters At Lloyd's, London,
Compagnie Transcontinentale De Reassurance,
Houston Casualty Company,
Lexington Insurance Company,
Munich Reinsurance Company,
National Union Fire Insurance Company,
Qatar Insurance Company,
Q.B.E. International Insurance, Ltd.,
Sorema Insurance Company,
Swiss Reinsurance Company,
Winterthur International Insurance Company,
Zurich Reinsurance Company in their own names and in the name Kaiser Alumina & Chemical Corporation

and

WALTER DUMAS, La. Bar No. 5163
DUMAS & ASSOCIATES LAW CORPORATION
The Lawyers Complex
1261 Government Street
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorney for Terrance Hayes

App. 1

Application For Writs

No. '07-C-893

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

NOV - 8 2007

/s/ Mary P. Legnon
Deputy Clerk

IN RE GRAMERCY PLANT EXPLOSION AT KAISER

IN RE THOMAS & BETTS CORP.

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ST. JAMES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE PEGRAM J. MIRE JR., DIVISION "D", NUMBER 25975

Attorneys for Relator:

Louis C. LaCour, Jr.
Raymond P. Ward
Attorneys at Law
4500 One Shell Square
701 Poydras Street
New Orleans, LA 70139
(504) 581-3234

WRIT GRANTED;
JUDGMENT REVERSED;
MOTIONS DENIED

Gretna, Louisiana this 30th day of January, 2008.

Ernest P. Gieger, Jr.
Andrew A. Braun
Daniel G. Rauh
Attorneys at Law
Suite 4800 One Shell Square
701 Poydras Street
New Orleans, LA 70139
(504) 561-0400

Joy G. Braun
Sharon C. Mize
Attorneys at Law
Suite 3500
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-1500

Attorneys for Respondent:

Walter C. Dumas
Travis J. Turner
Attorneys at Law
P.O. Box 1366
Baton Rouge, LA 70821
(225) 383-4701

Caleb H. Didriksen, III
Richard J. Garvey
Diane R. Cosenza
Loyd J. Bourgeois, Jr.
Amanda K. Wingfield
Attorneys at Law
3114 Canal Street
New Orleans, LA 70119
(504) 586-1600

Thomas G. Wilkinson
Michael P. Ciaccio
Attorneys at Law
320 Huey P. Long Avenue
Gretna, LA 70053
(504) 364-1892

WRIT GRANTED; JUDGMENT REVERSED; MOTIONS DENIED

On March 28, 2006, this Court, by published opinion, reversed the trial court judgment granting respondents' Motions for Judgment Notwithstanding the Verdict ("JNOV") and conditional grant of their Motions for New Trial. Importantly, this Court *rendered* judgment by reinstating the jury verdict.[1] *In re Gramercy Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So.2d 492, 501-502, *writ denied*, 06-1003 (La. 6/14/06), 929 So.2d 1271. One year later, respondents petitioned the trial judge for a new trial and change of venue. On October 10, 2007, the trial judge granted respondents' motion for new trial on discretionary grounds, including the trial judge's admission that he himself had committed numerous errors during trial. Relator, Thomas and Betts, seeks supervisory review of the trial court's grant of a new trial, on the basis that the judgment rendered by this Court is now final. *Id.*

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[1] We did not remand for the trial judge "to render and sign judgment on the jury verdict, allowing for all further proceedings or appeals as provided by law." *Cf. Junot v. Morgan*, 01-237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152.

A judgment that decides the merits of the case in whole or in part is a final judgment. La. C.C.P. art. 1841; *Tolis v. Board of Supervisors of Louisiana State University*, 95-1529 (La. 10/16/95), 660 So.2d 1206. A final judgment is conclusive between the parties except on direct review. La. R.S. 13:4231; *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173 (La. 7/2/96), 676 So.2d 1077, 1079.

Moreover, a judgment becomes final and definitive and acquires the authority of the thing adjudged if no further review is sought within the time fixed by law, if the Supreme Court denies an application for certiorari, or if the judgment is confirmed on further review. La. C.C.P. arts. 2166(A); La. C.C.P. art. 2166(E); *Avenue Plaza, L.L.C.*, 676 So.2d at 1079; *Tolis*, 660 So.2d at 1206. Once a final judgment becomes final and definitive and acquires the authority of the thing adjudged, no court has jurisdiction, in the sense of power and authority, to modify, revise or reverse the judgment, regardless of the magnitude of the error in the final judgment. *Avenue Plaza, L.L.C.*, 676 So.2d at 1079; *Tolis*, 660 So.2d at 1206.

Our March 28, 2006 judgment reversed the JNOV, reinstated the jury verdict, and reversed the conditional grant of a new trial on discretionary grounds. Respondent Hayes did not apply for rehearing to this Court or for writs of certiorari to the Louisiana Supreme Court. Thus, with respect to respondent Hayes, our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged on April

27, 2006, since no further review was sought within the time fixed by law.[2]

Respondents-Kaiser and AXA Global applied for writs of certiorari to the Louisiana Supreme Court. On June 14, 2006, the Supreme Court denied writs. *In re Gramercy Plant Explosion at Kaiser*, 06-1003 (La. 6/14/06), 929 So.2d 1271. Thus, with respect to respondents Kaiser and AXA Global, our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged on June 14, 2006, when the Louisiana Supreme Court denied writs. La. C.C.P. art. 2166(E). Thus, as of June 14, 2006, the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or any other issue.

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[2] La. C.C.P. art. 2166(A) reads, "Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed." *See also*, La. R.S. 13:4446(E), which states, "Judgments of all appellate courts become final and executory upon the expiration of the delay for applying for rehearing if no application therefor has been filed timely."

On this basis, we hereby grant Thomas and Betts' writ application, reverse the trial court's judgment granting respondents' a new trial, and deny respondents' motions for new trial.

Gretna, Louisiana, this 30th day of January, 2008.

/s/ SMC
JUDGE SUSAN M. CHEHARDY

/s/ MFE
JUDGE MARION F. EDWARDS

/s/ GGG
JUDGE GREG G. GUIDRY

IN RE GRAMERCY PLANT EXPLOSION AT KAISER	**23rd JUDICIAL DISTRICT COURT**
MASTER DOCKET NO. 25,975 DIV. "D"	**PARISH OF ST. JAMES STATE OF LOUISIANA**
FILED: Oct. 12, 2007	/s/ J. Donaldsen **DEPUTY CLERK OF COURT**

REASONS FOR JUDGMENT

THIS MATTER was heard on September 12, 2007, in Convent, Louisiana on a Motion for a New Trial.

On July 5, 1999, a major power outage and explosion occurred at Kaiser's facility in Gramercy, causing many people to be seriously injured and causing extensive property damages. The only parties currently remaining in this litigation are defendant Thomas & Betts Corporation and plaintiffs Terrance Hayes, who suffered permanent vision impairment from his injuries suffered on July 5, 1999, and Kaiser and its property reinsurers, AXA, et al, who suffered significant property and business interruption damages.

Trial was held from October 15, 2001 through November 19, 2001 in the St. James Parish courthouse on the issue of the liability of Thomas & Betts Corporation and others to over 20,000 claimants, and the issues of damages to Hayes, Kaiser and AXA.

The jury ultimately held in favor of plaintiffs, and against some defendants, PCS and Excel/MEI, and assigned damages to Hayes, but did not assign damages to Kaiser or AXA. The jury assigned no responsibility to T&B, despite evidence that T&B's product failed to comply with Louisiana's product liability law.

Following the jury verdict and entry of judgment in accordance with the jury verdict, Hayes, Kaiser, the certified class, and others filed motions for judgment notwithstanding the verdict and a new trial, which were granted by this Court. Thomas & Betts appealed and then settled with all remaining claimants except Kaiser and Hayes. After Thomas and Betts settled with all other plaintiff groups, the Fifth Circuit Court of Appeal reversed this Court's judgment notwithstanding the verdict and order for a new trial. The Supreme Court denied writs.

Kaiser/AXA, attempted to appeal the jury's verdict after the JNOV and new trial was reversed. T&B filed a motion to dismiss Kaiser/AXA's appeal. The Fifth Circuit granted T&B's motion to dismiss the appeal because there was no judgment adopting the jury verdict. The pre-JNOV judgment had been vacated when the JNOV was granted. No one had moved this Court to sign a new judgment adopting the jury verdict after the Fifth Circuit reversed the JNOV. The Fifth Circuit Court of Appeals concluded that there was no final judgment for Kaiser/AXA to appeal and recommended that the defendant could move this Court for a judgment in accordance with

the jury verdict, so that the matter could be out back on track. The Louisiana Supreme Court denied T&B's writs in which T&B requested the Supreme Court to deny this Court the opportunity to enter another judgment in this case.

Kaiser moved this Court on January 30, 2007 for a judgment to be entered adopting the jury verdict, which was entered at that time. T&B filed exceptions of prematurity to the motions for new trial based on the judgment and the judgment as being pre-mature, as they were filed before the appellate process related to T&B's motion to dismiss Kaiser's appeal was complete. At T&B's request, this Court entered T&B's form of judgment on September 4, 2007, after Hayes' un-lodged appeal was dismissed by the Fifth Circuit. Kaiser and Hayes' motions for new trial were timely filed thereafter.

This Court finds that is appropriate to order a new trial in this case, as a matter of discretion, as there were numerous errors and irregularities in the trial, and because it would be a miscarriage of justice to leave the jury verdict in place, based upon the trial.

ERRORS DURING TRIAL

The jury selection process was unusually difficult. Many potential jurors were either class members, or a family member of a class member. All class members and their family members were excused.

The anticipated length of the trial was a difficult issue. The trial did last just over six weeks. It was evident during the jury selection process that there was a potential problem with the jury venire.

There were some serious technical difficulties at the beginning of the trial, as the speaker system in the courtroom was not working, so many people complained that they could not hear the attorneys and witnesses. One of the court reporters hired by the defendants was unable to hear much of what was said. He was replaced after one or two days in the courtroom.

This was an unusually lengthy trial. Testimony was taken late into the evenings on several occasions. During trial, the lawyers for the parties and the court committed many errors. The record contains numerous objections to improper jury selection/venire, improper admission of testimony evidence due to violation of evidentiary rulings, improper exclusion of evidence, objections to T&B's counsel's counsel repeatedly testifying, mischaracterizing witness' testimony, and improperly commenting on testimony.

This Court committed certain errors during trial, including the failure to grant three motions for mistrial, which in retrospect, should have been granted. This Court failed to declare a mistrial sue sponte when Thomas & Betts witness violated the Court's sequestration order. This Court erroneously overruled objections to the jury venire as an unrepresentative cross section.

LAW

A trial court has the authority to order a new trial on its own motion, pursuant to Louisiana Code of Civil Procedure articles 1971 and 1973, so long as the trial court has continuing jurisdiction over the case, because a party has filed a motion for a new trial and/or a motion notwithstanding the verdict. *Horton v. Mayeaux,* 2005-1704 (La. 05/03/06), 931 So. 2d 338, 339.

The discretionary grounds for ordering a new trial under Louisiana Code of Civil Procedure article 1973 differ substantially from the mandatory grounds for granting a motion for a new trial under Louisiana Code of Civil Procedure article 1972, and differ from the grounds for granting a motion for a new trial based on a trial court's finding that the verdict is contrary to the evidence. *Horton,* 931 So. 2d at 344. *Horton v. Mayeaux* served to reconcile some confusion that was apparent in the fifth Circuit's reversal of this Court's discretionary grant of a new trial. *Horton,* 931 So. 2d at 338.

When a district court grants a motion for a new trial under Louisiana Code of Civil Procedure article 1972 on the grounds that the verdict is contrary to the law and/or evidence, the district court is indicating its belief that it must grant the motion due to some failing on the part of the jury to properly apply the law or the facts, *Horton*, 931 So. 2d at 344-345.

When a trial judge is convinced by his examination of the facts that the judgment would result in a

miscarriage of justice and grants a discretionary new trial under Louisiana Code of Civil Procedure article 1973, a new trial should be ordered. *Lawson v. Mitsubishi Motor Sales of America, Inc.*, 05-0257 (La. 09/06/06), 938 So. 2d 35, 54; *Horton v. Mayeaux,* 2005-1704 (La. 05/30/06), 931 So. 2d 338, 344; *Lamb v. Lamb*, 430 So. 2d 51 (La. 1983). In a motion for a new trial under Louisiana Code of Civil Procedure article 1973, the trial court may evaluate the evidence without favoring either party; it may draw its own inferences and conclusions; and evaluate witness credibility to determine whether the jury erred in giving too much credence to an unreliable witness. *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So. 2d 94. When a trial court grants a new trial on discretionary grounds under Louisiana Code of Civil Procedure article 1973, its decision does not undermine the fact-finding function of the jury, and does indicate the lower court's concern with a substantial injustice. *Horton,* 931 So. 2d at 344-345, Granting of a new trial on discretionary grounds indicates that this Court is concerned that this was not a fair trial. *Horton,* 931 So. 2d at 345. This Court chooses to exercise its "virtually unlimited discretion to order a new trial on discretionary grounds as good grounds for doing so do exist." *See Horton,* 931 So. 2d at 345.

This Court finds its reasons for ordering a new trial are more wide and varied that [sic] the reasons underlying the trial court's grant of a conditional new trial in *Horton.* This Court ruled before that the jury's

error and conduct at trial resulted in a miscarriage of justice and does so now. *Horton,* 931 So. 2d at 345.

The law of the case does not prevent this Court form [sic] considering this motion for a new trial in light of *Horton v. Mayeaux, Avenue Plaza, L.L.C. v. Falgoust,* 96-0173 (La. 07/02/96), 676 So. 2d 1077, 1079. The law of the case is a discretionary guide, and ordinarily prevents appellate courts from reconsidering its own rulings of law on a subsequent appeal. *Avenue Plaza,* 676 So. 2d. at 1079. However, reconsideration is warranted when it is obvious that a determination is "patently erroneous" and "produced unjust results," *State of Louisiana v. Stirgus,* 05-259 (La. App. 5 Cir. 11/29/05), 917 So. 2d 559, 564, *citing State v. Davis,* 03-488 (La. App. 5 Cir. 11/12/03), 861 So. 2d 638, 642 fn. 2.

The Louisiana Supreme Court's writ denial was without reasoning, and therefore did not decide the substance of the issue raised by Kaiser/AXA's writ application and application for rehearing, and thus there is no "decision" that is given the effect of the law of the case. *In Re K.P.W.,* 03-1371 (La. App. 5 Cir. 05/26/04), 875 SO. 2d 903, 906. The Fifth Circuit's decision to reverse the [sic] this Court's grant of a new trial under Louisiana Code of Civil Procedure article 1973 fulfills the "patently erroneous" and "unjust results" tests of *Horton v. Mayeaux,* 931 So. 2d 338.

The Louisiana Supreme Court decided *Horton v. Mayeaux* in May of 2006, two months after the Fifth

Circuit denied this Court's judgment notwithstanding the verdict and motion for a new trial, and the Fifth Circuit was thus without the benefit of this instructional case from Louisiana's highest court. *Horton* served to reconcile and differentiate the standards of review accorded to a trial court's granting a motion for a new trial, and the Supreme Court held that it is necessary for a reviewing court to determine whether the grant of a new trial was on mandatory or discretionary grounds. *Horton,* 931 So. 2d at 344. In *Horton,* the Louisiana Supreme Court affirmed the trial court's grant of a new trial, on the basis of the court's comments to counsel to speed the trial along, and that the jury worked too late one night, in uncomfortable conditions for approximately thirty minutes. *Horton,* 931 So. 2d at 344. The Supreme Court urged that "the only requirement has been that the district court 'state an articulable reason or reasons as to why he is exercising his discretionary powers.'" *Horton,* 931 So. 2d at 345, *citing Burris v. Wal-Mart Stores, Inc.,* 94-0921 (La. App. 1 Cir. 03/03/95), 652 So. 2d 558, 562, *writ denied,* 95-0858 (La. 5/12/95), 654 So. 2d 352. In this case, there are many valid and articulable reasons which form the basis of its grant of a new trial.

READ, RENDERED AND SIGNED this 10th day of October, 2007, in Chambers in Donaldsonville. Louisiana.

/s/ [Illegible]

PEGRAM J. MIRE, JR., JUDGE
23rd JUDICIAL DISTRICT COURT
DIVISION "D"

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

MASTER DOCKET
NO. 25,975 "D"

23RD JUDICIAL DISTRICT COURT

PARISH OF ST. JAMES

STATE OF LOUISIANA

Applies to:

26,542 Todd Landry et al. v. Power & Control Systems, Inc. et al. (Intervention)

26,821 Kaiser Aluminum & Chemical Corp. v. Power & Control Systems, et al.

26.861 Terrence Hayes et al. v. MEI Corp. et al.

26,865 AXA Global Risks (U.K.) et al. v. Thomas & Betts Corp. et al.

Filed: Sept. 6 2007 /s/ [Illegible]
Deputy Clerk of Court

Final Judgment on Jury Verdict

By order of this Court, the captioned matters 26,542, 26,821, 26,861, and 26,865, as cases consolidated into master docket no. 26,975, came on for trial on all issues of liability and damages before a twelve-member jury on October 8, 2001. All other consolidated matters were tried at that time on the issue of liability only, except the matter entitled *CII Carbon L.L.C. v. Kaiser Aluminum & Chemical Corp., et al.*, bearing docket No. 26,837. The matter of *Todd Landry et al. v. Power & Control Systems, Inc.*, Docket No. 26,542 was tried on all issues of liability and damages raised in the intervention filed on

behalf of plaintiffs in *AXA Global Risks (U.K.) et al. v. Thomas & Betts Corp.*, Docket No. 26,865.

Accordingly, trial was had on all issues in cases 26,542, 26,821, 26,861, and 26,865, by and between the following plaintiffs:

- AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagnie Transcontinentale De Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, all the foregoing as transferees and subrogees of rights formerly belonging to Trochus Insurance Company, Ltd. ("AXA, et al.");
- Terrence Hayes, individually and on behalf of his minor child, Jocelyn Pearl Hayes; and
- Kaiser Aluminum and Chemical Corporation;

and the following defendants:

- Thomas & Betts Corporation; and
- Schweitzer Engineering Laboratories, Inc.;

plaintiffs having settled or dismissed their claims against all other defendants originally named in this suit. Trial of this matter concluded on November 19, 2001, when the jury rendered its verdict in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against plaintiffs, assigning no fault to either Thomas & Betts Corporation or Schweitzer Engineering Laboratories, Inc., but apportioning fault to other parties appearing on the jury verdict form in accordance with Article 1812 of the Louisiana Code of Civil Procedure. Upon the reading of the jury verdict in open court and upon motion of counsel for Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., the Court adopted the jury's verdict as the judgment of the Court as follows:

It is ordered, adjudged and decreed that there be judgment in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against all claimants, including the plaintiffs named above, dismissing all claims against Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., however denominated, with full prejudice. Plaintiffs are hereby taxed with all costs, including expert-witness fees. The right of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. to move the court to set costs is hereby reserved.

It is further ordered that, in keeping with the requirements of Article 1916 of the Louisiana Code of Civil Procedure, the jury verdict apportioning fault

among the various parties be, and is hereby, adopted as the judgment of the Court, to wit:

Schweitzer Engineering Laboratories, Inc.	0%
Thomas & Betts Corp.	0%
Kaiser Aluminum & Chemical Corporation	75%
Certain other defendants as set forth in the jury verdict form	25%

Because the only parties adjudged at fault were dismissed before judgment was rendered, no written judgment as to damages is required or entered.

Read, rendered and signed in chambers at Donaldsonville, Louisiana, this 4th day of ~~June~~ September, 2007.

/s/ [Illegible]
Hon. Pegram J. Mire, Jr., Judge
23rd Judicial District Court
Division "D"

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2007-OC-0544

SUPREME COURT OF LOUISIANA

2007-0544 (La. 04/05/07); 954 So. 2d 132; 2007 La. LEXIS 864

April 5, 2007, Decided

JUDGES: Pascal F. Calogero, Jr., Catherine D. Kimball, Bernette J. Johnson, Chet D. Traylor, Jeannette Theriot Knoll, John L. Weimer, VICTORY J., would grant.

OPINION

Stay denied. Writ denied.

VICTORY, J., would grant.

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

NO. 06-CA-871 c/w 06-CA-872, 06-CA-873, and 06-CA-874

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ORDER

Mover, Thomas & Betts Corp. ("T&B"), seeks to have us dismiss Kaiser-AXA's appeal on the basis that all issues are *res judicata* pursuant to our prior opinion, *In re Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So.2d 492, *writ denied*, 2006-1003 (La. 9/1/06), 936 So.2d 190. In our previous opinion, however, we only addressed the issues of whether the trial court erred in granting a JNOV and new trial in favor of Kaiser-AXA; we reversed the judgment of the district court and reinstated the jury verdict, and the Louisiana Supreme Court subsequently denied writs.

Citing to the First Circuit's opinion in *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152, Kaiser asserts that its first opportunity to appeal the jury's verdict came after the supreme court denied writs from our opinion which reinstated the jury verdict. T&B argues, however, that, unlike the court in *Junot*, in our previous opinion we did not order the trial court to render and sign judgment on the jury verdict, allowing for all further proceedings or appeal as provided by law.

LSA-C.C.P. art. 2082 provides that an appeal can only be taken from a judgment of a trial court. In the present case, without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court.

Accordingly, for the foregoing reasons, T&B's Motion for Dismissal is granted. Each party is to bear its own costs.

Gretna, Louisiana this 16th day of January, 2007.

FOR THE COURT:

/s/ MFE
JUDGE MARION F. EDWARDS

/s/ WJR
JUDGE WALTER J. ROTHSCHILD

/s/ FHW
JUDGE FREDERICKA HOMBERG WICKER

23rd JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. JAMES

STATE OF LOUISIANA

MASTER DOCKET NO. 25,975 **DIVISION "D"**

APPLIES TO: 26,542
26,821
26,865

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

FILED: August 9, 2006 /s/ J. Donaldsen
DEPUTY CLERK

ORDER OF DEVOLUTIVE APPEAL

Considering the foregoing motion of plaintiffs for an order of devolutive appeal,

IT IS ORDERED that Plaintiffs, AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagnie Transcontinentale de Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, suing in their own names and in the names of Kaiser Aluminum and

Chemical Corporation, Kaiser Alumina Chemicals, Kaiser Jamaica, Ltd., Kaiser Bauxite Company, and Trochus Insurance Company, Ltd., are granted a devolutive appeal from the judgments on the jury's verdict which were signed by the trial court in the above cases on February 21, 2002.

Order signed in Donaldsonville, Louisiana, this 9th day of August, 2006.

/s/ [Illegible]
JUDGE PEGRAM MIRE,
DIVISION "D"
23rd JUDICIAL DISTRICT
COURT

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

(LODGED AS CARL BELL, ET AL. VERSUS KAISER ALUMINUM AND CHEMICAL CORPORATION)

NO. 04-CA-1151
C/W 04-CA-1152
THROUGH 04-CA-1191

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT PARISH OF ST. JAMES, STATE OF LOUISIANA, NO. 25975 c/w 25974 c/w 25979 c/w 25980 c/w 25984 c/w 25986 c/w 25997 c/w 25999 c/w 26542 c/w 26576 c/w 26591 c/w 26620 c/w 26655 c/w 26670 c/w 26671 c/w 26679 c/w 26775 c/w 26785 c/w 26817 c/w 26820 c/w 26821 c/w 26822 c/w 26826 c/w 26828 c/w 26829 c/w 26837 c/w 26839 c/w 26840 c/w 26841 c/w 26842 c/w 26843 c/w 26856 c/w 26860 c/w 26861 c/w 26863 c/w 26864 c/w 26865 c/w 26866 c/w 26868 c/w 26874 c/w 26876, DIVISION "D," HONORABLE PEGRAM J. MIRE, JR., JUDGE PRESIDING

March 28, 2006

SUSAN M. CHEHARDY
JUDGE

Panel composed of Judges Susan M. Chehardy, Clarence E. McManus, and Walter J. Rothschild

WALTER C. DUMAS
PATTI DURIO HATCH
Dumas and Associates Law Corporation
P.O. Box 1366
Baton Rouge, Louisiana 70821

RICHARD J. ARSENAULT
Neblett, Beard & Arsenault
P.O. Box 1190
Alexandria, Louisiana 71309
COUNSEL FOR PLAINTIFF/APPELLEE/
2nd APPELLANT, TERRENCE HAYES,
INDIVIDUALLY AND ON BEHALF OF HIS
MINOR CHILD, JOCELYN PEARL HAYES

CALEB H. DIDRIKSEN
DIANE R. COSENZA
RONALD J. VENTOLA
JOHN J. RUSKIN
Didricksen Law Firm
P.O. Box 1600
Gonzales, Louisiana 70707
COUNSEL FOR PLAINTIFFS/APPELLEES,
KAISER ALUMINA & CHEMICAL
CORPORATION/AXA GLOBAL RISKS, ET AL.

LOUIS C. LACOUR, JR.
RAYMOND P. WARD
Adams and Reese LLP
4500 One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139
ERNEST P. GIEGER, JR.
ANDREW A. BRAUN
Gieger, Laborde & Laperouse, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

ROBERT E. WINN
SHARON CORMACK MIZE
Sessions, Fishman & Nathan, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500
COUNSEL FOR DEFENDANT/APPELLANT,
THOMAS & BETTS CORP.

REVERSED; VERDICT REINSTATED

This is an appeal in an action comprising numerous consolidated cases from the Twenty-Third Judicial District Court, St. James Parish, arising out of a massive industrial explosion at the Kaiser Aluminum plant in Gramercy on July 5, 1999. At issue on the appeal is the liability of one defendant, Thomas & Betts Corporation. We reverse the trial court's grant of judgment notwithstanding the verdict and reinstate the jury's verdict. We also reverse the trial court's grant of a conditional new trial.

PROCEDURAL HISTORY

Originally there were 71 lawsuits arising from the Kaiser explosion, most of which were consolidated.[1] The plaintiffs included not only persons

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[1] After consolidation the district court assigned the suits the master case name of *In re: Gramercy Plant Explosion at Kaiser.* When the case was lodged on appeal, pursuant to this Court's internal policy it was filed under the name of the first of the consolidated cases, *Carl Bell v. Kaiser Aluminum, et al.*, No. 04-CA-1151 (23rd Judicial District Court No. 25,975). For uniformity of designation in the matter, however, we are ordering that the master case name be adopted as the name of the

(Continued on following page)

directly injured in the plant, but also inhabitants of the surrounding area, as well as commercial entities and insurers seeking compensation for property damage and business losses, and/or indemnification for any liability to other claimants.[2]

By the time of trial, all of the cases had been settled and/or dismissed except three: a suit by Kaiser Aluminum & Chemical Corporation ("Kaiser") for its uninsured losses caused by the explosion;[3] a personal injury suit by Kaiser employee Terrence Hayes ("Hayes");[4] and a suit by Kaiser's subrogated reinsurers – AXA Global Risks (U.K.), et al. (collectively "AXA") – for Kaiser's insured losses.[5]

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matter on this Court's records. The order is being issued in conjunction with release of this opinion.

[2] Most of the personal injury claimants were part of a class action, but others opted out of the class action to pursue their individual suits.

[3] *Kaiser Aluminum v. Power & Control Systems, Inc, et al.*, No. 04-CA-1171 (23rd Judicial District Court No. 26,821).

[4] *Terrence Hayes v. MEI Corporation, et al.*, No. 04-CA-1184 (23rd Judicial District Court No. 26,861).

[5] *AXA Global Risks (U.K.), et al. v. Thomas & Betts Corporation, et al.*, No. 04-CA-1187 (23rd Judicial District Court No. 26,865). The other reinsurers collectively included under the designation "AXA" are Allianz Insurance Company; Certain Underwriters at Lloyd's, London, individually subscribing to certain facultative reinsurance contracts issued to Trochus Insurance Company, Ltd., Compagnie Transcontinentale De Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance

(Continued on following page)

The defendants in these suits included Power & Control Systems, Inc. and Power & Control Systems International, Inc. (collectively "PCS"), which designed the electrical system at the Kaiser plant; MEI Corporation, MEI Electrical, Inc., Merit Electrical & Instrumentation, Inc., and Merit Electrical, Inc. (collectively "MEI"), and Excel Group, Inc., formerly known as Excel Electrical & Instrumentation, Inc. (collectively "Excel"), electrical contractors that performed work at the plant; Thomas & Betts Corporation ("T&B"), manufacturer of adhesive mounts used to hold wiring in the plant; Adhesives Research, Inc. ("ARI"), manufacturer of the adhesive used in the adhesive mounts; Walter Hansley, a worker alleged to have been instrumentally negligent in events leading to the explosion; Manpower, Inc., Manpower International, Inc. (collectively "Manpower"), the employers of Hansley; and Schweitzer Engineering Laboratories, Inc., manufacturer of an electrical relay used at the plant.

Kaiser/AXA (hereafter "Kaiser/AXA")[6] alleged that the explosion was caused by a power failure that began about a half-hour before the explosion and that

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Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company.

[6] Kaiser went through bankruptcy during the course of this suit, and the bankruptcy court allowed AXA to be subrogated to all Kaiser's claims. Hence, they are for practical purposes one party, "Kaiser/AXA."

the power failure was caused by concurrent fault of PCS, Schweitzer, MEI, Excel, T&B, and ARI. Kaiser/AXA contended the root cause of the power failure was improper installation of a handful of one-inch-square adhesive-backed cable-tie mounting bases (commonly referred to as "sticky-backs") inside high-voltage switchgear in an electrical building (Switch House 2) at the Kaiser plant.

Kaiser/AXA alleged the wiring ("CT leads") that was routed through the sticky-backs came into contact with a high-voltage bus bar when several sticky-backs came loose from the cabinet wall to which they were attached. Kaiser/AXA claimed the contact degraded the insulation on both the CT leads and the bus bar, eventually leading to a short-circuit (technically, a phase-to-ground fault). The fault caused a chain reaction, in which circuit breakers tripped on all three loop feeders supplying power to the plant, resulting in a power outage.

Kaiser/AXA alleged that PCS was negligent in failing to design the electrical system so that a fault in Switch House 2 would not take the entire electrical loop off-line and, further, that PCS was negligent in failing to program the computerized Schweitzer electrical relays properly. They alleged Excel was negligent for using sticky-backs inside high-voltage switchgear, where their coming loose could cause an electrical fault, and that T&B was liable for failure to warn Excel about the limitations inherent in the sticky-backs.

In response, T&B filed incidental actions against Kaiser and AXA, alleging that Kaiser destroyed, altered, concealed or denied T&B access to evidence bearing on the cause of the power failure.

The trial commenced on October 8, 2001 before a twelve-member jury, and continued over the course of 27 days.

Briefly, the evidence established that the explosion evolved following a power failure in Switch House 2, caused when electrical wiring that had been run along the side of a switchgear cabinet fell onto a piece of high-voltage bus bar, resulting in a phase-to-ground fault that interrupted power. Although Kaiser had a system that was supposed to isolate such power failures so that the whole plant would not be shut down, the system failed. Employees took actions intended to prevent overheating of the large towers (known as flash tanks) that process bauxite into alumina (a production phase in producing aluminum). However, the actions failed because some of the equipment was not operating properly. Within a short time the tanks overheated and exploded.

On November 19, 2001, the jury returned a verdict that absolved Schweitzer, T&B, and Hansley/Manpower of fault, but found that Kaiser, MEI, and PCS were at fault, their fault was a legal cause of the explosion, and apportioned their fault as follows: Kaiser, 75%; MEI, 5%; PCS, 20%. The jury awarded damages to Terrence Hayes in the amount of $20,307,000.00, but denied damages to his daughter

for loss of consortium, and denied damages to Kaiser, and to its insurers (AXA, et al.).

After the jury returned its verdict, Kaiser, AXA and Hayes filed motions for judgment notwithstanding the verdict (JNOV) and, alternatively, for new trial. The trial court granted JNOV in favor of Kaiser/AXA and against T&B, and also granted the motion for new trial conditionally, in the event the JNOV is reversed on appeal.

In the JNOV, the court found T&B to be 25% at fault, reduced Kaiser's allocation of fault to 60%, reduced the fault of PCS to 10%, and maintained the jury's fault allocation of 5% to MEI. The court also granted JNOV as to damages, awarding Kaiser/AXA combined damages of $335 million, $122 million less than the $457 million requested by Kaiser/AXA. Finally, the court provisionally granted Kaiser/AXA's motion for new trial, in the event the JNOV is [sic] be reversed on appeal, and ordered that the new trial be held in a different venue.

The JNOV maintained the jury's finding in favor of Hayes and also upheld the amount of the damage award to him.

ISSUES ON APPEAL

Originally both T&B and Hayes appealed; Hayes, however, dismissed his appeal and only the issues raised by T&B are before us.

On appeal T&B makes the following assignments of error:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict, and granted Kaiser's and AXA's motion for judgment notwithstanding the verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La.C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

LAW AND ANALYSIS

JNOV

T&B contends the trial court committed legal error by granting a JNOV against T&B after the jury exonerated T&B.

The Louisiana Products Liability Law, the basis for liability of T&B, provides in pertinent part:

> A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.
>
> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> * * *
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La.R.S. 9:2800.57.

In granting the JNOV, the trial court gave extensive written reasons within the judgment. He stated, first, the court had denied the plaintiffs' motion for a directed verdict against T&B at the close of trial because "the Court was of the opinion that it could be a jury question whether or not the power outage was a substantial cause in fact of the explosion."

> There was no question in the court's mind as to whether reasonable and fair minded men would find that Thomas & Betts had failed in its duty as set out under the

> LPLA by its complete failure to warn. The jury did find that the Thomas & Betts product failed in service, as is evident by their finding that the acts of Excel/MEI and PCS were legal causes of the accident and explosion. There is no other reasonable explanation for the attribution of fault to Excel/MEI and PCS. Having found that the power outage was cause [sic] by the failure of the Thomas & Betts product (the only work Excel/MEI performed that could be related in any way to the accident and explosion) this court believes the jury had to attribute fault to Thomas & Betts, whose product failed to satisfy the minimum requirements of products in Louisiana. As the jury failed to fulfill their responsibility to require this manufacturer to comply with its duty, this Court will rectify that problem. . . .

Finding that the jury erred, the court held that "the facts, inferences and the LPLA standards . . . point so favorably to the conclusion that Thomas & Betts bears fault for this accident and that Kaiser/AXA suffered substantial damages, that reasonable men could not reach the decision made by the jury," and granted the motion for JNOV, listing these reasons:

> With respect to liability, the court finds that Kaiser, Thomas & Betts, Excel/MEI and PCS all bore fault for this event. The court finds that Kaiser bore the majority of the fault through the acts of its employees and through its failure to have its overpressure

safety systems fully operational on the day of the accident, and assigns Kaiser 60% of the fault for the overall event. Thomas & Betts products were amply proven to be defective and not in compliance with the LPLA, and the power outage was acknowledged by the jury to be a causative factor in the overall event. I agree with the jury finding that the electrical outage was a substantial causative factor in the overall event. I assign the next highest responsibility for the overall accident to Thomas & Betts, to which I assign 25% fault. Thomas & Betts had specific knowledge with respect to suitability and use of their product which they withheld from the public. It is obvious that marking a product "for temporary use only" would reduce sales of that product. The court finds that Thomas & Betts made a choice to enhance its sales instead of properly warning the public about its product limitations, of which it was well aware. Excel/MEI, the electricians who installed the Thomas & Betts product, were found by the jury to have borne 5% of the fault for their use of the T&B product, which conclusion I will not disturb. PCS, the engineering overseers of Excel/MEI and programmer of the Schweitzer relays for Kaiser was found by the jury to bear 20% of the fault for this accident. As Thomas & Betts provided the engineering diagram to any of its customers who asked, which shows the intended use of the product to be identical to the manner in which Excel/MEI and PCS used it, I will reduce the fault of PCS to 10%.

> I concur with the jury, and do not find Schweitzer Engineering Labs to have borne any fault for this particular power outage or accident. I also concur with the jury and do not find Walter Hansley/Manpower to have borne any fault to this particular accident.

A motion for JNOV may be granted on the issue of liability or on the issue of damages or on both issues. La.C.C.P. Art. 1811(F). The strict criteria for granting judgment notwithstanding the verdict (JNOV) is predicated on the rule that when there is a jury, the jury is the trier of fact. *Smith v. State, Dept. of Transp. & Development,* 04-1317, 2004-1594 (La. 3/11/05), 899 So.2d 516.

> [A] JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences

> or factual questions should be resolved in favor of the non-moving party.

Trunk v. Medical Center of Louisiana at New Orleans, 04-0181, p. 4 (La. 10/19/04), 885 So.2d 534, 537, citing *Joseph v. Broussard Rice Mill, Inc.*, 00-0628, pp. 4-5 (La. 10/30/00), 772 So.2d 94, 99; see also *VaSalle v. Wal-Mart Stores, Inc.*, 01-0462, p. 11 (La. 11/28/01), 801 So.2d 331, 338-39.

> In reviewing a JNOV, an appellate court must first determine whether the district judge erred in granting the JNOV by using the above-mentioned criteria in the same way as the district judge in deciding whether to grant the motion. Thus, the appellate court must determine whether the "facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict." If the appellate court determines that reasonable persons might reach a different conclusion, then the district judge erred in granting the motion and the jury verdict should be reinstated. [Citations omitted.]

Trunk, 04-0181 at p. 5, 885 So.2d at 537.

In ruling on a motion for a judgment notwithstanding the verdict (JNOV), the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party; this rigorous standard is based upon the principle that when

there is a jury, the jury is the trier of fact. *Martin v. Heritage Manor South Nursing Home,* 00-1023 (La. 4/3/01), 784 So.2d 627.

T&B asserts a reasonable jury could find Excel negligent for failing to comply with Kaiser's general specifications governing Excel's work. T&B states there is ample basis for a reasonable jury to assign fault to Excel and PCS without assigning fault to T&B. For example, the jury could have decided Excel was negligent in failing to understand or follow Kaiser's general specifications for the job, which required the CT leads to be enclosed in flexible metal conduit. (It was uncontested that had conduit been used, the power failure would not have occurred.)

In addition, T&B argues, the jury could reasonably expect that Excel, a professional electrical contractor, already knew or should have known about the obvious limitations of a peel-and-stick wire mount and the inappropriateness of using such a product in a high-voltage cabinet.

Further, negligent programming of the Schweitzer relays by PCS escalated a fault in a single switch house into a plant-wide power failure.

Finally, T&B urges that the jury's reasonable allocation of fault mandates reversal of the JNOV. Specifically, T&B avers, the 25% fault assigned to the electricians (PCS & Excel) and the 75% fault allocation to Kaiser are reasonable allocations of fault.

With respect to T&B's liability, the evidence was that William Philyaw bought a package of T&B mounting bases, which he had used on numerous prior occasions. He used these adhesive-backed plastic bases to attach low-voltage electrical control wires to the wall in a switchgear cabinet at the Kaiser plant. Philyaw was an employee of electrical contractor Excel.[7]

By July 5, 1999, 13 months after they were installed, all of the T&B mounts in the switchgear cabinet had fallen off the wall and the wires they previously supported were loose and sagged against a high-voltage bus bar. The resulting phase-to-ground fault ultimately resulted in the explosions and catastrophic damage.

Philyaw said at trial he would not have used the T&B bases if T&B had supplied warnings that the bases were not intended for permanent installations. T&B points out, however, that Philyaw must have known that the sticky-backs might come loose over time, because he said he tried to route the wires so that if for some reason the wire came off the wall, it would not contact the bus bar.

Philyaw denied knowing the sticky-backs might loosen, but a reasonable jury could find his actions

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[7] Excel is also referred to as "Excel/MEI" because it either merged with or was bought by MEI.

indicated otherwise. Philyaw admitted he had seen a few sticky backs come off walls before.

There was also testimony that Kaiser's engineer, Ken Scannapiego, knew that sticky-backs may detach from the surface, and that Kaiser's electrical maintenance superintendent, John Scavona, would not have used the product in a high voltage application.

It is the jury's prerogative to assess witness credibility. In ruling on a motion for JNOV, the trial court may not evaluate credibility, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. *Joseph v. Broussard Rice Mill, Inc.*, 00-628, p. 5, 772 So.2d at 99.

The issue for the trial court was whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not arrive at a contrary verdict. Despite the trial court's statement, we conclude that reasonable persons could arrive at a contrary verdict, as this jury did.

The jury was allowed to view and handle sticky-backs during the trial. In looking at them, the jury could decide for themselves whether the limitations of the product – a one-inch square piece of plastic, with three channels on the top surface and an adhesive-backed foam pad on the back surface – should have been obvious to Excel and its employee, Philyaw, as well as to Kaiser, which inspected the work done by its electrical contractors.

It is reasonable for the jury to decide that a person – in particular, a professional wiring installer – should perceive the obvious limitations of the item. Further, it is reasonable for the jury to decide that Philyaw's actions demonstrated awareness of the risk.

Further, regarding the argument that T&B's failure to include a warning about temporary use versus permanent use violated the LPLA, the adequacy of any particular warning is a question for the jury. *Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140, 145 (La. 1990). The testimony by the Kaiser/AXA expert, Jerry Householder, and T&B's expert, Jerry Purswell, directly conflicted. Purswell compared the sticky-back to a nail – another simple fastening device that can be used in temporary or permanent settings, and which generally comes with no warnings. It was the jury's province to decide which witness's testimony to credit. A reasonable jury could have decided that a sticky-back, like a nail, does not need the kinds of warnings that Kaiser/AXA argues for.

Additional questions for the jury decision were proximate cause and allocation of fault. La.R.S. 9:2800.54 provides,

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from

a reasonably anticipated use of the product by the claimant or another person or entity.

B. A product is unreasonably dangerous if and only if:

* * *

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57. . . .

When there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident. Whether the defendant's conduct was a substantial factor in bringing about the harm, and, thus, a cause-in-fact of the injuries, is a factual question to be determined by the factfinder. *Theriot v. Lasseigne,* 93-2661, p. 5 (La. 7/5/94), 640 So.2d 1305, 1310.

The jury here may reasonably have allocated fault according to the parties' control over, or the role played by, the instrumentalities that caused the explosion. Kaiser (assigned 75% fault by the jury) controlled the entire plant, including the electrical system, the vessels that exploded, and the nonfunctioning pressure-relief systems that directly caused the explosion.

PCS (assigned 20% fault by the jury) erroneously programmed the Schweitzer relays, which was a direct cause of the plant-wide power failure. However, PCS's failure was an indirect, less proximate cause of the explosion compared to Kaiser's misconduct.

The jury allocated only 5% fault to Excel, and reasonably may have found that Excel's wiring in the switch house was an indirect cause of the power failure and that intervening, independent negligence by PCS was required to turn the electrical fault in Switch House 2 into a large-scale power failure, and that much greater intervening negligence by Kaiser was required to turn the power failure into an explosion.

Unlike Excel, T&B could not have known the risk created by the proximity between the CT leads and the high-voltage bus bars. Further, since Philyaw testified he never saw any of the warnings or instructions accompanying the stick-backs, the jury could reasonably find that any alleged deficiency in the warnings or instructions was not a proximate cause of any of the events.

Even when a plaintiff proves that the lack of an adequate warning or instruction rendered a product unreasonably dangerous, a presumption arises that the user would have read and heeded such admonitions. *Bloxom v. Bloxom,* 512 So.2d 839, 850 (La. 1987). The presumption, may, however, be rebutted if the manufacturer produces contrary evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances. *Id.*

Considering all the above factors, we conclude that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different

conclusions." *Trunk,* 04-181, p. 4, 885 So.2d at 537. Accordingly, we find the trial court erred in granting the motion for judgment notwithstanding the verdict.

New Trial

In granting the conditional motion for new trial, the trial court included the following written reasons within the judgment:

> I have the right to grant a new trial under purely discretionary grounds under CCP art. 1973, which I would do if I did not grant the JNOV, or would do in the alternative. In retrospect, there were multiple occasions during the six weeks of trial when it may have been appropriate to grant some of the Motions for Mistrial that were orally argued. Virtually all of the lawyers made mistakes at one point or another during this over six week trial.
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> * * *
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> If the JNOV is overturned by the Court of Appeal, fundamental fairness, the difficulty in picking a jury that does not have pre-conceived ideas about Kaiser, and the errors and irregularities that occurred during this lengthy trial mandate a new trial.
>
> I note that CCP art. 1813(E) also provides a potential basis for a new trial, as the special verdict form as completed by the jury contained irreconcilable answers.

> I have the right to grant a new trial if the judgment is contrary to law and/or to evidence under CCP art. 1972. I would do so under this article as well. Some of the reasoning for granting a new trial under CCP art. 1972 is outlined by the reasons in support of the JNOV, and the other reasoning outlined above.

T&B contends the trial court erred by granting plaintiffs' alternative motion for a new trial in a new forum, because the jury's fair interpretation of the evidence precludes new trial under La.C.C.P. art. 1972(1) and new trial pursuant to La.C.C.P. art. 1973 is not warranted because the verdict is not a miscarriage of justice. Further, T&B asserts, there is no basis for a change of venue.

A party may join a motion for new trial with a motion for judgment notwithstanding the verdict, or may pray for a new trial in the alternative. La.C.C.P. art. 1811(A)(2). If the court grants the motion for judgment notwithstanding the verdict, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for a new trial. La.C.C.P. art. 1811(C)(1). If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise. La.C.C.P. art. 1811(C)(2).

A motion for a new trial requires a less stringent test than for a judgment notwithstanding the verdict (JNOV), as such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury. *Davis v. Wal-Mart Stores, Inc.*, 00-0445 (La. 11/28/00), 774 So.2d 84.

A conditional grant of a new trial is not to be used to give the losing party a second bite at the apple without facts supporting a miscarriage of justice that would otherwise occur. *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So.2d 94.

In several recent cases, our supreme court has ruled that when a JNOV is reversed on determination that the jury's verdict was reasonable in light of the evidence presented, the conditional new trial also should be reversed.[8] We find that reasoning applicable here, and conclude the trial court abused its discretion in granting the conditional new trial.

Since we have determined the trial court erred in granting the conditional new trial, the issue of change of venue is moot. Accordingly, we need not address it.

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[8] *Trunk*, 04-181, p. 11, 885 So.2d at 540 ("Because we have previously concluded that the jury's verdict was reasonable in light of the evidence presented, we find that plaintiff is not entitled to a new trial."); *see also, VaSalle*, 01-462, p. 18, 801 So.2d at 342; *Davis v. Witt*, 02-3102, p. 23, 851 So.2d at 1134 ("When any fair interpretation of the evidence supports the jury's verdict, the grant of a new trial must be reversed.").

DAMAGES

Our reversal of the JNOV also eliminates the trial court's award of damages to Kaiser; hence, we need not address T&B's assignment of error on this issue.

DECREE

For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.

REVERSED; VERDICT REINSTATED.

IN RE: GRAMERCY PLANT EXPLOSION

AT KAISER

MASTER DOCKET NO. 25,975 "D"

APPLIES TO: ALL CASES

FILED: Dec. 17, 2002

STATE OF LOUISIANA

PARISH OF ST. JAMES

/s/ [Illegible]
DEPUTY CLERK OF COURT

JUDGMENT AND REASONS

THIS MATTER came before the Court as Judgment Notwithstanding the Verdict and/or In the Alternative, Motion for New Trial/Change of Venue.

This case involves the explosions at the Kaiser Gramercy facility in the early morning hours of July 5, 1999, and the injuries and damages that flowed from the explosions. The trial was held from October 15, 2001 through November 19, 2001. All plaintiffs who had not fully settled their claims were present for the liability trial against all remaining defendants. Damages cases were put on by one of the badly injured Kaiser workers, Terrence Hayes, and by Kaiser and its property insurers, which this court collectively refers to as Kaiser/AXA.

At trial, plaintiffs claimed that an entire plant electrical outage or blackout occurred, which was followed about one half hour later by an explosion or series of explosions that destroyed much of the plant, injured many plant workers, some very badly, caused property damages inside and outside of the plant and

disrupted the lives of many residents of Gramercy and the surrounding areas, some of whom claim physical and emotional injuries resulting from the explosions.

The plaintiffs claimed that the electrical outage was caused by the failure of some Thomas & Betts adhesive backed mounting plates, which they claimed fell off a high voltage electrical cubical enclosure wall, which allowed a 120 volt wire to contact a 7,000 volt bus bar, causing a short circuit and forcing the interruption of power to the plant.

Thomas & Betts defended by admitting that the adhesive based mounts did fall off the wall, but claimed that the adhesive backed mounts fell off the wall after the bus bar experienced the short circuit, and did not fail before the short circuit, and that even if the adhesive backed mounts did fail and cause the power outage, that the power outage was not a legal cause of the explosion. Thomas & Betts claimed that Kaiser caused the explosion by its failure to properly supervise and train its own employees, and by its failure to have adequate pressure relief valves and clean relief piping in place to protect the plant from pressure surges during power outages.

The claim against Schweitzer Engineering Labs was that the Schweitzer relay, a computer that is an advanced form of circuit breaker, failed to react to the short circuit in time to pick and choose to open the correct circuit breakers to keep part of the power available to critical areas of the plant, and for

Schweitzer's failure to warn that its components should not have been used with wiring installed using Thomas & Betts adhesive backed mounting plates.

Schweitzer defended by claiming that any choice of, installation of, and programming of its relay was done by the engineering firm, PCS, and that its printed materials were sufficiently clear that signal wires were to be securely fastened to any enclosure. Schweitzer claimed that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against Excel/MEI was that Excel/MEI installed the low voltage wiring (that was used with the Schweitzer relay) using Thomas & Betts adhesive backed mounts, which mounts ultimately failed, and that the failure of the Thomas & Betts mounts was a precipitating cause of the power outage that preceded and caused the explosions.

Excel/MEI responded that it used the Thomas & Betts products in the exact manner in which Thomas & Betts indicated that they should be used and according to the directions provided by Thomas & Betts, that it believed that the Thomas & Betts adhesive backed mounts were permanent products, and that even if the adhesive based mounts fell off the wall before the short circuit, that the loose wire did not contact the 7,000 volt bus bar and was not the cause of the short circuit. Excel/MEI claimed that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against PCS, a group of power control engineers, was that they oversaw the installation of the Thomas & Betts adhesive based mounts by MEI/ Excel, chose the Schweitzer relays, programmed the Schweitzer relays, and that the work did not perform as Kaiser was told it would.

PCS defended that it followed the Schweitzer documentation, that the short circuit or fault occurred at a spot at which the Schweitzer relay would not be expected to see the problem, that the Thomas & Betts product was acceptable for the use to which it was put, that Kaiser also supervised and approved the installation of the Schweitzer relays and the Thomas & Betts adhesive based mounts, and that Kaiser was responsible for the loss for the same reasons stated by Thomas & Betts.

The claim against Manpower was that they were responsible for the acts of their temporary employee, Walter Hansley, who was working at the Kaiser plant as a Manpower employee, and who, during the emergency caused by the power outage, had controlled the slurry and steam flows in the Kaiser vessels (digesters and flash tanks) in a way that allowed pressures and flows to build up beyond what the vessels were designed to accept. Hanley had been trained as a control room operator by Kaiser and had worked for Kaiser for about 30 years before retiring and being hired back into the plant as a Manpower employee. Manpower settled with all parties before and during the early days of the trial. Very little was said about Manpower during the trial.

The jury rendered its verdict on November 19, 2001 in which it found responsibility on the part of Kaiser, PCS and MEI/Excel for the explosion and damages. The jury exonerated Manpower, Thomas & Betts, and Schweitzer. All plaintiffs subsequently brought Motions for JNOV and for New Trial requesting a JNOV against Thomas & Betts and in the alternative, a new trial against Schweitzer and Thomas & Betts. The post trial motions were argued and taken under advisement, and shortly thereafter, Kaiser filed for bankruptcy protection under Chapter 11 of the United States bankruptcy code. Kaiser's interest in this matter has recently been released from bankruptcy court supervision.

JNOV

The Supreme Court's test for consideration of a motion for a JNOV is provided in *Joseph v. Broussard Rice Mill, Inc.*, 772 So.2d 94, 99 (La. 2000); which ruling was recently cited, adopted and approved again in *VaSalle v. Wal-Mart Stores*, 801 So.2d 331 (La. 2001) reh. Den., in which the Court held:

> "JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when

> there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions."

There is only one person who testified as to why the T&B product was stuck to the wall in the enclosure. William Philyaw was the supervisor for Excel/MEI who installed the Thomas & Betts adhesive backed mounts in the electrical cabinet, which mounts eventually fell off the wall. Mr. Philyaw testified that he used the T&B product on the high voltage cabinet enclosure wall because he thought it was a product that would support the wires to the wall permanently. He further testified that if he had known that Thomas & Betts would only recommend them for temporary use, and not as a permanent support device, that he would have used something else. He testified that he read the instructions on the bag and followed them.

Even some of Thomas & Betts' own witnesses, including experts, testified that they did not know that these Thomas & Betts adhesive based mounting bases should not be used in a permanent electrical application until they were told as much by Thomas & Betts in connection with this case.

The packaging used for the Thomas & Betts product has minimal instructions and warnings provided by Thomas & Betts to the public. Additional

information is provided by Thomas & Betts only upon request by customer or an engineer. The Thomas & Betts engineering sales drawing, which was distributed to the public when additional information on the product was requested, shows the Thomas & Betts product in use in the same application as it was used at Kaiser. There was no testimony that anyone involved in the installation of electrical wires requested or reviewed the engineering sales drawing, however it is indicative of what MEI/Excel or PCS would have received from Thomas & Betts about the product that was used, had they made a special request for more information.

According to T&B's own experts, the product was miss-applied [sic], as it did not belong in this location, supporting wires. The product had no warnings not to use the product to support wires, and instead, was sold as a product to support wires.

The plaintiff bears the burden of proof that 1) The manufacturer's product possesses a characteristic rendering the product unreasonably dangerous, 2) that this characteristic "proximately caused" the damage, and (3) that these damages "arose from a reasonably anticipated use of the product." Plaintiffs successfully fulfilled these requirements. 1) The Thomas & Betts adhesive backed mounts were known by Thomas & Betts to fail in normal service and to be useful only as temporary supporting devices, which information was not provided to the public; 2) The jury found that the failure of the adhesive backed mounts installed by MEI/Excel was a proximate

cause of the explosion and damages; and 3) the Thomas & Betts engineering sales drawings demonstrates the use at the Kaiser plant of these mounts to be a reasonably anticipated use of the product.

The Thomas & Betts product in use at Kaiser before the explosion was unreasonably dangerous as a result of its lack of warnings, which product failed to meet the requirements of LSA R.S. 9:2800.54A and B(3) and 9:2800.57A and C, Louisiana's Products Liability Act (LPLA) explicitly requires that a manufacturer, in order to be relieved of his duty to warn, prove that the user or handler of the product already knew or reasonably should have been expected to know of the product's dangerous characteristic; the statute does not authorize courts to judicially notice or assume ipse dixit that a particular purchaser is a sophisticated intermediary with respect to a specific latent dangerous characteristic of a product. Swope v. Columbian Chemicals Co., C.A.5 (La.)2002, 281 F.3d 185. Thomas & Betts did not so prove. As a matter of law, LSA R.S. 9:2800.57B(1) and (2) were not proven by Thomas & Betts at trial.

PCS and Excel could not have been held responsible for this accident by the jury unless the electrical outage was a proximate cause of the explosion. Excel's responsibility could only be based upon the use of the T&B adhesive based mount. The uncontroverted evidence was that William Philyaw, who installed the Thomas & Betts adhesive backed mounts in the high voltage electrical cabinet, believed the T&B adhesive based mounts were to be used as a

permanent mounting device to hold wires against the wall of the cabinet, and he followed the instructions on the bag that were provided by Thomas & Betts. He further testified that had Thomas & Betts warned or instructed that the mounts were to be used for temporary applications only, he would not have used the mounts in that application.

JNOV after denial of Directed Verdict

When Plaintiffs requested a directed verdict against Thomas & Betts at the close of the trial, while the Court believed that the power outage was a substantial cause in fact of the explosion, the Court was of the opinion that it could be a jury question whether or not the power outage was a substantial cause in fact of the explosion. There was no question in the court's mind as to whether reasonable and fair minded men would find that Thomas & Betts had failed in its duty as set out under the LPLA by its complete failure to warn. The jury did find that the Thomas & Betts product failed in service, as is evident by their finding that the acts of Excel/MEI and PCS were legal causes of the accident and explosion. There is no other reasonable explanation for the attribution of fault to Excel/MEI and PCS. Having found that the power outage was caused by the failure of the Thomas & Betts product (the only work Excel/MEI performed that could be related in any way to the accident and explosion) this court believes that the jury had to attribute fault to Thomas & Betts, whose product failed to satisfy the minimum

requirements of products in Louisiana. As the jury failed to fulfill their responsibility to require this manufacturer to comply with its duty, this Court will rectify that problem. That this court denied the motion for directed verdict at the conclusion of trial does not mean that the court cannot grant the JNOV. Delaney v. Whitney Nat. Bank, 703 So.2d 709 (4th Cir. 1997), reh. den., writ den. (1998).

The jury erred. The facts, inferences and the LPLA standards established in the record point so favorably to the conclusion that Thomas & Betts bears fault for this accident and that Kaiser/AXA suffered substantial damages, that reasonable men could not reach the decision made by the jury, so the motion for JNOV is granted.

With respect to liability, the court finds that Kaiser, Thomas & Betts, Excel/MEI and PCS all bore fault for this event. The court finds that Kaiser bore the majority of the fault through the acts of its employees and through its failure to have its overpressure safety systems fully operational on the day of the accident, and assigns to Kaiser 60% of the fault for the overall event. Thomas & Betts products were amply proven to be defective and not in compliance with the LPLA, and the power outage was acknowledged by the jury to be a causative factor in the overall event. I agree with the jury finding that the electrical outage was a substantial causative factor in the overall event. I assign the next highest responsibility for the overall accident to Thomas & Betts, to which I assign 25% fault. Thomas & Betts had

specific knowledge with respect to the suitability and use of their product which they withheld from the public. It is obvious that marking a product "for temporary use only" would reduce the sales of that product. The court finds that Thomas & Betts made a choice to enhance its sales instead of properly warning the public about its product limitations, of which it was well aware. Excel/MEI, the electricians who installed the Thomas & Betts product, were found by the jury to have borne 5% of the fault for their use of the T&B product, which conclusion I will not disturb. PCS, the engineering overseers of Excel/MEI and programmer of the Schweitzer relays for Kaiser was found by the jury to bear 20% of the fault for this accident. As Thomas & Betts provided the engineering diagram to any of its customers who asked, which shows the intended use of the product to be identical to the manner in which Excel/MEI and PCS used it, I will reduce the fault of PCS to 10%. I concur with the jury, and do not find Schweitzer Engineering Labs to have borne any fault for this particular power outage or accident. I also concur with the jury and do not find Walter Hansley/Manpower to have borne any fault to this particular accident.

With respect to damages, having found that the JNOV should be granted, this court is to review the damages awards de novo, and is not constrained by the restriction that applies to the Court of Appeals that any increase or decrease be limited to the lowest (or highest) point reasonably within the discretion

afforded the Court of Appeals. *Langlinais v. Figueroa*, 636 So.2d 983 (5th Cir. 1994).

The court does not find any fault with the jury's damage award to Mr. Hayes.

Thomas & Betts' own expert, Barry Mabry, testified that Kaiser/AXA suffered damages of no less than $252,000,000.00. Kaiser's expert, Harold Asher, testified that Kaiser suffered losses of over $450,000,000.00, which included uninsured losses of approximately $150,000,000 over and above the $304,500,000 that Kaiser was paid by its property insurers, AXA. AXA's representative, Gary Reeve testified that over $304,500,000 was paid by AXA to Kaiser for insured losses. AXA's economist, Mike Daigle, testified that AXA's reimbursable losses from a tortfeasor should be equal to the payments it made under its policy to Kaiser.

This court is of the opinion that some of the $304,500,000.00 in payments to Kaiser made under the insurance policy issued by AXA are not necessarily reimbursable to Kaiser or to AXA by a tortfeasor. I find the AXA component of the Kaiser/AXA damages to be $295,000,000. This court also is of the opinion that some, but not all, of the $150,000,000.00 claimed uninsured and unreimbursed losses sustained by Kaiser are taxable against a tortfeasor. I find that $40,000,000 of Kaiser's claimed uninsured losses are taxable against the tortfeasors. This court finds that the combined taxable damages sustained by Kaiser and AXA was $335,000,000.00.

New Trial

In the alternative, the plaintiffs have moved for a new trial. Having granted the motion for a judgment notwithstanding the verdict, I must now consider the motion for new trial. LSA C.C.P. art. 1811.

"When a trial judge is convinced by his examination of the facts that the judgment would result in a miscarriage of justice, a new trial should be ordered." Lamb v. Lamb, 430 So.2d 51 (La. 1983). Lamb v. Lamb was a divorce case in which reference to all of the technical rules would not result in the granting of a new trial. Only by resorting to concern about equity and a miscarriage of justice could the Supreme Court order a new trial.

I have the right to grant a new trial under purely discretionary grounds under CCP art. 1973, which I would do if I did not grant the JNOV, or would do in the alternative. In retrospect, there were multiple occasions during the six weeks of trial when it may have been appropriate to grant some of the Motions for Mistrial that were orally urged. Virtually all of the lawyers made mistakes at one point or another during this over six week trial.

> "In Searle v. Travelers Insurance Company, 557 So.2d 321, 323 (La.App. 4 Cir.1990), the Fourth Circuit said: The Louisiana Code of Civil Procedure does not expressly provide for mistrials, and the jurisprudence concerning motions for mistrial is limited. Generally, mistrials are properly granted because of some fundamental failure in the proceeding.

> 76 Am.Jur.2d, Trial Sec. 1073. It is well settled in Louisiana law that a motion for mistrial in a civil case should be granted under the following circumstances:
>
> (1) when, before the trial ends and the judgment is rendered, the trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity and
>
> (2) where no other remedy would provide relief to the moving party. Spencer v. Children's Hospital, 432 So.2d 823, 826 (La.1983); Streeter v. Sears, Roebuck & Co., 533 So.2d 54, 62 (La.App. 3d Cir.1988), writ denied 536 So.2d 1255 (La.1989), Motions for mistrial should also be granted upon proof of prejudicial misconduct occurring during a jury trial, which cannot be cured by admonition or instructions, 76 Am.Jur.2d, Trial Sec. 1072."
>
> Alfonso v. Piccadilly Cafeteria, Inc., 665 So.2d 589, 593 (La.App. 5 Cir. 11/28/95).

If the JNOV is overturned by the Court of Appeal, fundamental fairness, the difficulty in picking a jury that does not have pre-conceived ideas about Kaiser, and the errors and irregularities that occurred during this lengthy trial mandate a new trial.

I note that CCP art. 1813(E) also provides a potential basis for a new trial, as the special verdict form as completed by the jury contained irreconcilable answers.

I have the right to grant a new trial if the judgment is contrary to law and/or to evidence under CCP art. 1972. I would do so under this article as well. Some of the reasoning for granting a new trial under CCP art. 1972 is outlined by the reasons in support of the JNOV, and the other reasoning outlined above.

Venue

The reasons for change of venue within this district espoused by Thomas & Betts and by Manpower, Inc. before trial are generally adopted and accepted by the Court. The Manpower brief referenced the many news articles that were published that criticized Kaiser, its actions, its maintenance, its safety record and its strike breaking workers and Manpower did not believe that Kaiser could get a fair trial in St. James Parish. Thomas & Betts adopted Manpower's brief by reference. The court was concerned before trial and has concluded that Kaiser can not [sic] have an impartial jury impaneled in this Parish as a result of the numerous controversies that it has had with its unions, its retirees, and the class members. It is the belief of this court that everyone in this Parish was well aware, before this current litigation, that Kaiser had locked out its union and operated with non-union employees for a lengthy period of time before the explosion. The picket line was an obvious landmark on Airline Highway for an extended period of time. The local newspapers reported on the strike and on Kaiser's disputes with its employees. The difficulties encountered in picking a jury

for this particular case are obvious from a review of the selection process.

Whatever the prejudice that existed before the trial, the results of the first trial, in which Kaiser was found to be significantly at fault, were published and are common knowledge among the general population. The local sentiment toward Kaiser, not just before this trial, but after this trial is well known to this court. The fact that these claims arose as the result of an accident that occurred during Kaiser's union lockout, cannot be ignored.

The Court finds that this matter could have and should have been transferred to a different venue within this district for trial. In the event that the court of appeals overturns the JNOV, then this matter will be transferred to a different Parish within this district for the new trial.

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment Notwithstanding the Verdict be and the same is hereby granted as follows:

With respect to liability, the Court assigns to Kaiser, sixty (60%) percent of fault; Thomas & Betts, twenty-five (25%) percent of fault; Excel/MEI, five (5%) percent; and, PCS, ten (10%) percent of fault.

With respect to damages, the Court finds as follows:

Damages sustained by Kaiser and AXA is THREE HUNDRED THIRTY FIVE MILLION ($335,000,000.00) DOLLARS

Damages sustained by Mr. Hayes will remain per jury award, TWENTY MILLION THREE HUNDRED SEVEN THOUSAND ($20,307,000.00) DOLLARS total.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for New Trial in the Alternative is hereby GRANTED and the Motion for Change of Venue in the Alternative is hereby GRANTED.

JUDGMENT READ, RENDERED AND SIGNED in Chambers at Donaldsonville, Louisiana this 16th day of December, 2002.

/s/ [Illegible]
HON. PEGRAM J. MIRE, JR., JUDGE
23RD JUDICIAL DISTRICT COURT
DIVISION "D"

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

MASTER DOCKET NO. 25,975 "D"

STATE OF LOUISIANA

PARISH OF ST. JAMES

23rd JUDICIAL DISTRICT COURT

Applies To:

25,974 (Kevin Weber)
25,975 (Carl Bell/Master Class-action petition)
25,977 (Rosemary B. Gordon)
25,979 (Donald Batiste)
25,980 (Celestine Martin)
25,984 (Ronald C. Gray)
25,986 (Gertrude Taylor)
25,997 (Deborah Martin)
25,999 (Ida Mae Jasmin)
25,655 (Chad Jones)
26,775 (Howard Ramagos)
26,785 (Pearl Armant)
26,822 (Erica Brignac)
26,828 (Ellis Hall, Sr.)
26,860 (Curtis Mosley)
26,863 (Betty Thomas)
26,864 (Wilhemina Heltz)
26,866 (Melissa Williams)
26,868 (Brenda Borne)
26,874 (Edward Banks)

FILED: Feb. 28, 2002 /s/ [Illegible]
DEPUTY CLERK OF COURT

FINAL JUDGMENT OF JURY VERDICT

By order of this Court, the captioned matters, which were subsumed by the Master Petition for Damages-Class Action NO. 25,975, came on for trial on all issues of liability before a twelve-member jury on October 8, 2001. All consolidated matters were tried at that time on the issue of liability only, except the matter entitled *CII Carbon L.L.C. v. Kaiser Aluminum and Chemical Corporation, et al*, bearing Docket No. 26,837, and the following matters which were tried on the issues of liability and damages:

Axa Global Risks (U.K.), et al vs. Thomas & Betts Corp., et al, Docket No. 26,865; and

Kaiser Aluminum and Chemical Corporation v. Power & Control Systems, Inc., et al Docket No. 26,821.

Terrance Hayes et al vs. MEI Corporation, et al, Docket No. 26,881.

In addition, the matter of *Todd Landry et al vs. Power & Control Systems, Inc., et al* Docket No. 26,542 was tried on all issues of damages and liability raised in the intervention filed on behalf of certain insurers of Kaiser Aluminum and Chemical Corporation.

Trial was held on all issues in the above captioned case by and between plaintiffs and defendants, Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., plaintiffs having settled or dismissed their claims against all other defendants originally named in these cases. Trial of these matters

concluded on November 19, 2001, when the jury rendered its verdict in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against plaintiffs assigning no fault to either Thomas & Betts Corporation or Schweitzer Engineering Laboratories, Inc., but apportioning fault to other parties appearing on the jury verdict form in accordance with Article 1812 of the Louisiana Code of Civil Procedure. Upon the reading of the jury verdict in open court and upon motion of counsel for Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., the Court adopted the jury's verdict as the judgment of the Court as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. and against all claimants, including plaintiffs, dismissing all claims against Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc., however denominated, with full prejudice. Plaintiffs are hereby taxed with all costs, including expert-witness fees. The right of Thomas & Betts Corporation and Schweitzer Engineering Laboratories, Inc. to move the court to set costs is hereby reserved.

IT IS FURTHER ORDERED that, in keeping with the requirements of Article 1916 of the Louisiana Code of Civil Procedure, the jury verdict apportioning fault among the various parties be, and is hereby, adopted as the judgment of the Court, to wit:

Schweitzer Engineering Laboratories, Inc.	0%
Thomas & Betts Corporation	0%
Kaiser Aluminum & Chemical Corporation	75%
Certain other defendants as set forth in the the jury verdict form	25%

Because the only parties adjudged at fault were dismissed before judgment was rendered, no written judgment as to damages is required or entered.

By prior Order of this Court the trial of this matter was intended to and did dispose of all remaining claims and issues in these lawsuits. Accordingly, the Court finds that there is no just reason for delay, and designates this judgment as final for purposes of Article 1915 of the Louisiana Code of Civil Procedure.

RENDERED in Open Court in Convent, Louisiana on the 19th day of November, 2001.

READ AND SIGNED in Chambers at Donaldsonville, Louisiana this 21st day of February, 2002.

/s/ [Illegible]

HON. PEGRAM J. MIRE, JR., JUDGE
23rd JUDICIAL DISTRICT COURT
DIVISION "D"

TWENTY-THIRD JUDICIAL DISTRICT COURT

PARISH OF ST. JAMES

STATE OF LOUISIANA

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER	**MASTER DOCKET NO. 25,975,** **DIVISION "D"**
Nov. 19, 2001	/s/ Jan Donaldsen Dty Clerk

JURY VERDICT FORM

1. Do you find that Schweitzer was at fault, and if so, that its fault was a legal cause of the explosion?

Yes _____
No ✓

2. Do you find that Thomas & Betts was at fault, and if so, that its fault was a legal cause of the explosion?

Yes _____
No ✓

3. Do you find that Kaiser Aluminum and Chemical Corporation was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

4. Do you find that Walter Hansley/Manpower was a fault, and if so, that his fault was a legal cause of the explosion?

Yes _____
No ✓

5. Do you find that Excel/Merit Electrical and Instrumentation (M.E.I.) was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

6. Do you find that Power and Control Systems, Inc. was at fault, and if so, that its fault was a legal cause of the explosion?

Yes ✓
No _____

7. You are now asked to allocate percentage of fault among all the parties above that you marked "yes" for, with the *total* percentage equal to 100%:

   a. Schweitzer (*only* if you answered yes to #1 above. If not, put "0"):

   0 %

   b. Thomas & Betts (*only* if you answered yes to #2 above. If not, put "0"):

   0 %

c. Kaiser Aluminum and Chemical Corporation (*only* if you answered yes to #3 above. If not, put "0"):

75 %

d. Walter Hansley/Manpower (*only* if you answered yes to #4 above. If not, put "0"):

0 %

e. Excel/Merit Electrical and Instrumentation (M.E.I.) (*only* if you answered yes to #5 above. If not, put "0"):

5 %

f. Power and Control Systems, Inc. (*only* if you answered yes to #6 above. If not, put "0"):

20 %

Total: 100 %

8. State the amount of damages, if any, which you would find that the plaintiffs incurred as a result of the explosion:

a. Terrance Hayes:

i. past and future physical injury suffered $ 2,700,000

ii. past and future physical pain and suffering $ 2,700,000

iii. past and future mental anguish, stress, inconvenience and loss of enjoyment of life; $ 2,700,000

iv.	past and future disability;	$ 4,030,000
v.	past and future loss of wage and earnings capacity;	$ 770,000
vi.	permanent scarring and disfigurement, and;	$ 2,700,000
vii.	past and future medical expenses, including life care plan.	$ 5,400,000
	Total for Hayes	$ 20,307,000

b. Jocelyn Pearl Hayes (daughter):

Loss of consortium, society and other impairments to the child/parent relationship $ 0

c. AXA, et al (Kaiser's Property Insurers) $ 0

d. Kaiser Aluminum and Chemical Corporation $ 0

/s/ Cindy S. Martin
FOREPERSON

11-19-01
DATE

The Supreme Court of the State of Louisiana

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER (LODGED AS CARL BELL, ET AL.

NO. 2006-C-1003

VS

KAISER ALUMINUM AND CHEMICAL CORPORATION

IN RE: Kaiser Alumina & Chemical Corporation; AXA Global Risks (U.K.) etal [sic]; – Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975 and all other consolidated numbers; to the Court of Appeal, Fifth Circuit, No(s). 04-CA-1151, 04-CA-1152 THROUGH 04-CA-1191

June 14, 2006

Denied.

CDT

PFC

BJJ

JPV

JTK

JLW

Supreme Court of Louisiana
June 14, 2006

/s/ Rai L. Daigle
Deputy Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

IN RE GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

IN RE: Q.B.E. International Insurance Ltd.; Swiss Reinsurance Company; Zurich Reinsurance Company; Houston Casualty Company; Munich Reinsurance Company; Qatar Insurance Company; AXA Global Risks (U.K.) et al.; Sorema Insurance Company; Winterthur International Insurance Company; Certain Underwriters at Lloyd's London; Lexington Insurance Company; Kaiser Alumina & Chemical Corporation; Hayes, Terrance; National Union Fire Insurance Company; Compagnie Transcontinentale De Reassurance; Allianz Insurance Company; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

May 2, 2008

Denied.

JTK

CDK

BJJ

JPV

CDT

JLW

CALOGERO, C.J., would grant and assigns reasons.

Supreme Court of Louisiana
May 2, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

IN RE: Hayes, Terrance, Kaiser Alumina & Chemical Corporation, AXA Global Risks (U.K.) et al; – Plaintiff(s); Applying for Reconsideration of this Courts order dated May 2, 2008; Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No.07-C-893

June 20, 2008

Reconsideration denied.

BJJ

CDK

JPV

CDT

JTK

JLW

CALOGERO, Chief Judge, would grant.

Supreme Court of Louisiana

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

23rd JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. JAMES

STATE OF LOUISIANA

MASTER DOCKET NO. 25,975 **DIVISION "D"**

APPLIES TO: 26,542
26,821
26,865

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

FILED: August 9, 2006 /s/ Jan Donaldsen
DEPUTY CLERK

MOTION FOR DEVOLUTIVE APPEAL

Plaintiffs, AXA Global Risks (U.K.), Allianz Insurance Company, Certain Underwriters at Lloyd's London, Compagne Transcontinentale de Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company, suing in their own names and in the names of Kaiser Aluminum and Chemical Corporation, Kaiser Alumnia Chemicals, Kaiser Jamaica, Ltd., Kaiser Bauxite Company, and Trochus Insurance Company, Ltd., through undersigned counsel,

move the court for an order of devolutive appeal from the Judgments on the jury's verdict which were signed by the trial court in the above cases on February 21, 2002.

DIDRIKSEN LAW FIRM

/s/ Caleb H. Didriksen

CALEB H. DIDRIKSEN, III, NO. 1334
DIANE R. COSENZA, NO. 4419
RICHARD J. GARVEY, JR., NO. 20822
MARY E. LORENZ, NO. 29322
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 822-3114
Facsimile: (504) 822-3119

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(1)

No. 08-139

Supreme Court, U.S.
FILED
SEP 3 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TERRANCE HAYES, et al.,

Petitioners,

v.

THOMAS & BETTS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS C. LACOUR, JR.,
Counsel of Record
ADAMS AND REESE LLP
701 Poydras Street
Suite 4500
New Orleans, LA 70139
Tel: (504) 581-0328

ERNEST P. GIEGER, JR.
ANDREW A. BRAUN
GIEGER, LABORDE & LAPEROUSE, LLC
701 Poydras Street
Suite 4800
New Orleans, LA 70139
Tel: (504) 561-0400

RAYMOND PETER WARD
ADAMS AND REESE LLP
701 Poydras Street
Suite 4500
New Orleans, LA 70139
Tel: (504) 585-0339

ROBERT E. WINN
JOY GOLDBERG BRAUN
SHARON CORMACK MIZE
SESSIONS, FISHMAN, NATHAN & ISRAEL, LLP
201 St. Charles Ave.
Suite 3500
New Orleans, LA 70170
Tel: (504) 582-5200

Attorneys for Thomas & Betts Corp., Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 2006, the Louisiana court of appeal rendered a judgment in favor of respondent, reinstating a jury verdict in respondent's favor. This judgment became final and definitive under Louisiana law when the Louisiana Supreme Court denied certiorari. Two years later, the same court of appeal held that its 2006 judgment cannot be "appealed" or otherwise modified. In so ruling, did the court of appeal correctly apply Louisiana law?

LIST OF PARTIES

Respondent is satisfied with petitioners' list of parties, except to note that respondent's correct name is "Thomas & Betts Corp."

CORPORATE DISCLOSURE STATEMENT

Thomas & Betts Corp. has no parent corporation. Tontine Management, L.L.C. owns 12.47% of T&B's stock.

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Frank L. Maraist and Hon. Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure*, vol. 1, § 13.4 (West 2007) 14

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In re Gramercy Plant Explosion at Kaiser, 792 So. 2d 738 (La. 2001) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 836 So. 2d 109 (La. 2003) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 842 So. 2d 408 (La. 2003) (denying supervisory writ)

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In re Gramercy Plant Explosion at Kaiser, 2007 La. App. LEXIS 294 (Feb. 23, 2007) (denying rehearing)

CITATIONS OF REPORTED DECISIONS – Continued

In re Gramercy Plant Explosion at Kaiser, 954 So. 2d 132 (La. 2007) (denying supervisory writ to review decision underlying 2007 La. App. LEXIS 294)

In re Gramercy Plant Explosion at Kaiser, 982 So. 2d 763 (La. 2008) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 983 So. 2d 1263 (La. 2008) (denying reconsideration of 982 So. 2d 763)

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to entertain petitioners' due-process and equal-protection arguments, because petitioners failed to raise these arguments timely in the Louisiana Supreme Court. *See* 28 U.S.C. § 1257(a); *Cardinale v. La.*, 394 U.S. 437, 438 (1969).

STATEMENT OF THE CASE

On July 5, 1999, a massive explosion occurred at the Kaiser plant in Gramercy, Louisiana, when several large vessels became pressurized far beyond their capacity with superheated steam. A jury would eventually find that the primary cause of the explosion (75%) was Kaiser's decades-long neglect of its pressure-relief systems, including Kaiser's unfathomable decision to disable all the pressure-relief valves serving the vessels that exploded. A secondary cause (25%) was a power failure preceding the explosion, caused in small part (5%) by an electrical contractor's misuse of a product made by respondent, Thomas & Betts Corp. (T&B).

This massive explosion led to massive litigation: several personal-injury suits by Kaiser employees,[1] business-interruption suits by Kaiser's industrial neighbors, suits by Kaiser itself and its reinsurers

[1] The petition erroneously states that the explosion injured "thousands of people. . . ." Pet. for Cert. 3. In fact, the number of injured persons was 29.

(AXA Global Risks U.K. et al.), and several class actions on behalf of people living near the Kaiser plant. Among the many defendants named in these suits were T&B and the electrical contractor who misused T&B's product. These numerous suits were consolidated in the 23rd Judicial District Court in St. James Parish, Louisiana.

The T&B product at issue in the litigation was a one-inch square peel-and-stick adhesive mounting base – commonly referred to as a "sticky back" – used to anchor a nylon electrical-wire tie. Plaintiffs theorized that the root cause of the power failure preceding the explosion was the failure of the sticky backs to adhere to the inside wall of a cabinet containing high-voltage (13.8 kV) bus bars. The allegation against the electrical contractor was that it should have known not to use sticky-backs inside a high-voltage cabinet, because of the possibility that they might come loose over time. The allegation against T&B was failure to warn the electrical contractor of things that, according to plaintiffs, the electrical contractor should have already known.

The trial occurred in the fall of 2001 and lasted six weeks. Before and during trial, numerous settlements occurred, so that by the end of the trial, the only claims left were those of Kaiser, AXA, Kaiser employee Terrence Hayes, and the class-action plaintiffs against T&B and another defendant. The trial ended with a unanimous jury verdict holding T&B blameless for the explosion.

The trial judge signed judgments on the verdict. Rather than appeal, the losing plaintiffs sought relief from the verdict through post-trial motions for judgment notwithstanding the verdict (JNOV), conditional new trial, and change of venue. On December 16, 2002, the trial judge granted JNOV, assigning 25% fault to T&B and fixing plaintiffs' total damages at over $355 million. He also conditionally granted the various motions for new trial and change of venue.

T&B appealed. Hayes cross-appealed, but for reasons unknown, he voluntarily dismissed his appeal.[2] While the case was on appeal, Kaiser went into bankruptcy, and AXA and the other reinsurers purchased AXA's litigious rights against T&B. As a practical matter, this merged Kaiser and the reinsurers for purposes of this litigation.

In due course, T&B prevailed in its appeal, just as it had prevailed before the jury. On March 28, 2006, a unanimous panel of the Louisiana court of appeal reversed the JNOV, reversed the conditional new trial, and reinstated the jury's verdict. *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d 492 (La. App. 5 Cir. 2006).

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[2] *See* Pet. for Cert. App. 32, *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d 492, 497 (La. App. 5 Cir. 2006). While the case was on appeal, the class-action claims against T&B were settled.

Under La. Code Civ. P. art. 2166(A), a judgment of a Louisiana court of appeal becomes final and definitive if the aggrieved party fails to apply to the court of appeal for rehearing with 14 days of notice of judgment and fails to apply to the Louisiana Supreme Court for certiorari within 30 days of notice of judgment. Petitioner Hayes failed to apply to the court of appeal for rehearing and failed to apply to the Louisiana Supreme Court for certiorari. Thus, the court of appeal's judgment became final and definitive as to Hayes on April 27, 2006.

Kaiser-AXA likewise failed to apply to the court of appeal for rehearing. Kaiser-AXA did apply timely to the Louisiana Supreme Court for certiorari, but on June 14, 2006, the Louisiana Supreme Court denied the application. *In re Gramercy Plant Explosion at Kaiser*, 929 So. 2d 1271 (La. 2006).[3] Under La. Code Civ. P. art. 2166(E), this denial of certiorari rendered the court of appeal's judgment final and definitive as to Kaiser-AXA.

At this point, the litigation should have ended. But rather than accept the court of appeal's judgment with quiet dignity and grace, Kaiser-AXA and Hayes have sought to perpetuate the litigation.

After the court of appeal's judgment on T&B's appeal became final and definitive, Kaiser-AXA returned to the trial court and moved for an order of

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[3] *See* Pet. for Cert. App. 74.

appeal from the original, four-year-old, pre-JNOV judgment on the jury verdict. And the trial court granted the appeal. T&B moved to dismiss this appeal on several grounds, including untimeliness, *res judicata*, and the lack of an appealable judgment. The court of appeal granted T&B's motion and dismissed the appeal, finding that there was no appealable judgment. But in language unnecessary to its decision, it suggested that this omission could be remedied by a new trial-court judgment.[4]

Relying on the court of appeal's *obiter dicta*, Kaiser-AXA returned to the trial court, obtained the trial court's signature on a purported judgment on the 2001 jury verdict, and immediately filed a motion for new trial. Hayes likewise filed his own motion for new trial. In response, T&B pleaded *res judicata* and lack of trial-court jurisdiction to overrule a judgment of a superior court, i.e., the court of appeal, on the issue of new trial. After some procedural wrangling (the details of which are not important here), what emerged from the trial-court proceedings were: (a) yet another judgment on the 2001 jury verdict; and (b) a second order granting a new trial.

In response to the new-trial order, T&B applied to the Louisiana court of appeal for a supervisory writ. T&B argued that the trial court had no authority to overrule the court of appeal, which had previously reversed the trial court on the issue of new

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[4] Pet. for Cert. App. 22.

trial. T&B further argued that the court of appeal's 2006 judgment was final and definitive, thus extinguishing Kaiser-AXA's and Hayes's claims against T&B.

In a unanimous decision, the court of appeal granted T&B's writ application, reversed the trial court's order, and decreed that its 2006 judgment was indeed final and definitive, not subject to further modification by any court on any issue.

Kaiser-AXA and Hayes applied to the Louisiana Supreme Court for a writ to review the court of appeal's judgment, raising various state-law arguments. Lacking from this writ application was any argument based on federal law. The writ application contained no citation to the United States Constitution, any decision of this Court, or any other source of federal law.[5] Also lacking from the writ application were the phrases "due process," "equal protection," or any of their synonyms. The only "constitutional right" asserted by Kaiser-AXA and Hayes was the "right to appeal,"[6] a right non-existent under federal

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[5] *See infra* App. 10-13 (table of authorities from writ application). The writ application contains one reference to "decisions . . . [of] the United States Supreme Court . . . ," *infra* App. 14, but no citation to any specific decision of this Court.

[6] *See infra* App. 19 ("constitutionally protected right to appeal"); *infra* App. 22 ("constitutional right to appeal"); *infra* App. 34 ("Violation of Applicants' Right to Appeal"); *infra* App. 44-45 (several references to "right of appeal" or "right to appeal").

law.[7] In a 6:1 decision, the Louisiana Supreme Court denied the writ application.

Kaiser-AXA and Hayes applied to the Louisiana Supreme Court for rehearing and – for the first time – purported to invoke the United States Constitution. But the rules of the Louisiana Supreme Court forbid rehearing from a writ denial.[8] Perhaps for this reason, the Louisiana Supreme Court denied rehearing without addressing Kaiser-AXA and Hayes's belated constitutional arguments.

SUMMARY OF THE ARGUMENT

Kaiser-AXA and Hayes, petitioners, failed to raise their federal-law issues timely in the state courts. This failure is fatal to their petition. They failed to raise any issue of federal law in the Louisiana court of appeal or in their writ application to the Louisiana Supreme Court. The first time they purported to raise their federal-law arguments was in their motion for rehearing in the Louisiana Supreme Court. This motion was unauthorized by the Louisiana Supreme Court's rules, which do not allow for

[7] *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930).

[8] *See* La. S. Ct. R. IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ. . . .").

rehearing following denial of a writ application. Even if the motion were authorized, this Court's caselaw holds that an issue is generally untimely if raised for the first time in a rehearing application in the state's highest court.

Even if Kaiser-AXA and Hayes's due-process and equal-protection arguments were properly before this Court, the arguments would have no merit. Kaiser-AXA and Hayes had ample notice that the court of appeal's 2006 judgment on T&B's appeal would become final, definitive, and unalterable if and when the Louisiana Supreme Court denied certiorari, because the caselaw saying so was on the books for 10 years before the court of appeal's judgment. And despite their protests that they never had the chance to "appeal the verdict," in fact Kaiser-AXA and Hayes had the right, in the course of T&B's appeal, to attack the verdict with any argument supported by the record. And in fact, they did attack the verdict in T&B's appeal, in defense of both the trial court's JNOV and its conditional order of a new trial. The court of appeal considered these arguments and rejected them, finding the verdict to be reasonable based on the evidence presented at trial.

ARGUMENT

1. Kaiser-AXA and Hayes failed to raise a substantial federal question timely in the Louisiana Supreme Court.

This Court may grant a writ of certiorari to review a final judgment or decree by the highest court of a state, but only if the petitioner has properly raised and preserved a substantial federal constitutional issue in the state courts. *See Cardinale v. La.*, 394 U.S. 437, 438 (1969); 28 U.S.C. § 1257(a). The petitioners here have failed to properly and timely raise their purported federal issues in state court. Their writ application in the Louisiana Supreme Court was devoid of any citation to federal law or any invocation of any right provided by federal law.[9] The only "right" they asserted in their writ application was the so-called "right to appeal."[10] But the United States Constitution does not guarantee litigants in state-court civil cases any right to appeal. *See Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth

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[9] *See infra*, App. 10-13 (table of authorities from writ application).

[10] *See* n. 6 *supra* and accompanying text.

Amendment does not require a State to provide appellate review. . . . ").

After the Louisiana Supreme Court denied petitioners' writ application, petitioners attempted to apply for rehearing, and for the first time purported to invoke the United States Constitution.[11] This attempt came too late. The rules of the Louisiana Supreme Court do not allow rehearing from a writ denial. *See* La. S. Ct. R. IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ. . . . ").

Even if the rehearing petition were permissible under Louisiana law, it would still not be a proper vehicle for introducing a federal question. This Court's caselaw holds that, as a general rule, "[q]uestions presented to the highest State court on a petition for rehearing come too late for consideration here. . . . " *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *see also Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 162-63 (1932) (due-process argument "cannot serve as the basis for review by this Court" when not raised in state supreme court until petition for rehearing).

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[11] *See infra*, App. 58 *et seq.* (motion for rehearing); *infra* App. 62 (citations to decisions of this Court).

2. Kaiser-AXA and Hayes had fair notice that the judgment on T&B's appeal would have the authority of *res judicata*.

On page 6 of their petition, Kaiser-AXA and Hayes suggest that they were "without notice" that the court of appeal's 2006 judgment could be the final judgment in this case, foreclosing a second appeal. This suggestion is specious. The law applied by the court of appeal in rendering the judgment complained of was more than a decade old when the parties were litigating T&B's appeal.

More than 10 years before the court of appeal rendered its 2006 judgment, the Louisiana Supreme Court rendered its decision in *Tolis v. Board of Supervisors of LSU*, 660 So. 2d 1206 (La. 1995). This decision is the basis of the court of appeal's judgment now complained of by petitioners. *Tolis* teaches that a final judgment may be rendered by an appellate court, and that a judgment by an appellate court that decides the merits of the case is a final judgment. *Id.* at 1206. A judgment of a Louisiana court of appeal acquires the authority of the thing adjudged (*res judicata*) when the Louisiana Supreme Court denies certiorari. *Id.* at 1207. Once that happens, no court has jurisdiction, in the sense of power or authority, to modify, revise, or reverse the judgment, even if the judgment is erroneous. *Id.* at 1206-07.

Tolis controlled the proceedings below and compelled the court of appeal to render the judgment now complained of. The court's 2006 judgment was based

not on legal technicalities, but on the merits. The court reversed the JNOV because the jury's verdict was reasonable based on the evidence:

> Despite the trial court's statement, we conclude that reasonable persons, could arrive at a contrary verdict, as this jury did.

Pet. for Cert. App. 41, 927 So. 2d at 500.

> [W]e conclude that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." . . . Accordingly, we find the trial court erred in granting the motion for judgment notwithstanding the verdict.

Pet. for Cert. App. 44-45, 927 So. 2d at 501, quoting *Trunk v. Med. Center of La. at New Orleans*, 885 So. 2d 534, 537 (La. 2004).

The court of appeal reversed the conditional new trial for the same reason: the jury's verdict was reasonable based on the evidence:

> In several recent cases, our supreme court has ruled that when a JNOV is reversed on a determination that the jury's verdict was reasonable in light of the evidence presented, the conditional new trial also should be reversed. We find that reasoning applicable here. . . .

Pet. for Cert. App. 47, 927 So. 2d at 502.

This judgment on the merits became final and definitive as to petitioner Hayes when he failed to

apply timely to the court of appeal for rehearing or to the Louisiana Supreme Court for certiorari. *See* La. Code Civ. P. art. 2166(A). This same judgment became final and definitive as to petitioner Kaiser-AXA when the Louisiana Supreme Court denied its application for certiorari. *Id.* art. 2166(E); *In re Gramercy Plant Explosion at Kaiser*, 929 So. 2d 1271 (La. 2006). In this context, "final" means "not to be altered or undone." *Webster's Ninth New Collegiate Dictionary* 463 (1984). Once final under article 2166, the court of appeal's 2006 judgment became definitive, acquiring the authority of *res judicata*: the thing adjudged. *Wheat v. Caruthers*, 439 So. 2d 1065, 1066 (La. 1983). The court of appeal's latest decision, in accord with *Tolis*, recognizes these unalterable facts.

Kaiser-AXA and Hayes knew or should have known of the 10-year-old *Tolis* decision while litigating T&B's appeal. Their failure to heed its lesson does not raise a substantial federal issue.

3. In the course of T&B's appeal, Kaiser-AXA and Hayes had the opportunity to attack the verdict with any argument supported by the record.

The crux of Kaiser-AXA and Hayes's petition is their complaint that they never had the chance to appeal "the verdict." Their argument betrays a profound misunderstanding of Louisiana appellate procedure.

To begin with, Louisiana law does not permit an appeal of "the verdict." What one appeals is a judgment, not a verdict. *See* La. Code Civ. P. art. 2082 ("Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court."). Although a jury verdict may serve as the basis of a judgment, the verdict itself is not a judgment. Frank L. Maraist and Hon. Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure*, vol. 1, § 13.4 (West 2007).

Here, when the trial court first signed judgments on the jury verdict, Kaiser-AXA and Hayes had the right to appeal. They chose to forgo that right, choosing instead to move for JNOV and conditional new trial. They knew when they filed these motions that, if the motions were granted, the trial court's judgment on the verdict would be vacated, and they would no longer have the opportunity to appeal the judgment on the verdict.

After the trial court granted JNOV and conditional new trial, Kaiser-AXA and Hayes again had the right to appeal, to seek to have the trial court's judgment modified in their favor. In fact, Hayes availed himself of this right and appealed. But for reasons unknown to T&B, he voluntarily dismissed his appeal.[12] Kaiser-AXA, for its part, chose again to forgo its right to appeal.

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[12] *See* Pet. for Cert. at App. 32; *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d at 496.

T&B did appeal. And after the record was filed in the court of appeal, Kaiser-AXA and Hayes had 14 days to answer T&B's appeal. Under Louisiana law, an answer to an appeal is the functional equivalent of a cross-appeal, giving the appellee the right to seek to have the judgment modified in its favor. *See* La. Code Civ. P. art. 2133(A). But Kaiser-AXA and Hayes chose to forgo answering the appeal.

Even if they were totally satisfied with the judgment in their favor, Kaiser-AXA and Hayes still remained free – as appellees – to attack the verdict with any argument supported by the record, in defense of the JNOV, the conditional new trial, or both. La. Code Civ. P. art. 2133(B) ("A party who does not seek modification, revision, or reversal of a judgment in any appellate court . . . may assert, in support of the judgment, any argument supported by the record. . . . "). Even if an argument was overlooked or flatly rejected by the trial court, they still could have raised it in defense of the trial court's judgment. *Roger v. Estate of Moulton*, 513 So. 2d 1126, 1136 (La. 1987); *RPM Pizza, Inc. v. Automotive Cas. Ins. Co.*, 601 So. 2d 1366, 1370 (La. 1992); *Davis v. Borskey*, 660 So. 2d 17, 21 n. 6 (La. 1995).

Repeatedly in their petition, Kaiser-AXA and Hayes refer to unspecified "errors," rendering the jury's verdict "defective."[13] Whatever these so-called

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[13] *See* Pet. for Cert. 6 ("The jury verdict was so defective . . . "); *id.* at 12 (new trial granted "due to the errors and irregularities

(Continued on following page)

"errors" consisted of – evidentiary rulings, jury instructions, comments of counsel, etc. – all of them could have been raised in the course of T&B's appeal, either to attack the jury verdict in support of the JNOV or to defend the conditional new trial. Even if the verdict were simply wrong, the argument could have been made during T&B's appeal in defense of the new trial. *See* La. Code Civ. P. art. 1972(1) (new trial shall be granted if verdict is clearly contrary to the law and the evidence); Pet. for Cert. App. 63 (trial court citing art. 1972 to justify new trial).

In sum, every argument that Kaiser-AXA and Hayes might make against the verdict today was available to them in T&B's appeal from the JNOV and conditional new trial. Any failure by them to make their arguments timely does not entitle them to re-do the appeal.

4. The court of appeal necessarily considered the sufficiency of the evidence supporting the jury verdict.

Kaiser-AXA and Hayes make the repeated claim that "the appellate court . . . has never reviewed the jury trial under the applicable standards."[14] Even a cursory review of the decision of the court of appeal refutes this contention. The court exhaustively

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that occurred at trial."); *id.* at 15 ("This trial was so fraught with error . . . ").

[14] *See* Pet. for Cert. 6 (argument heading).

reviewed the trial evidence, and analyzed it under a standard of review more favorable to Kaiser-AXA and Hayes than they could ever hope for in a direct appeal of the verdict.

In its decision, the court of appeal identified the task before it in its review of the grant of JNOV by the district court:

> [T]he appellate court must determine whether the 'facts and inferences point so strongly and overwhelmingly in favor of the moving party [Kaiser-AXA and Hayes] that reasonable persons could not arrive at a contrary verdict. If the appellate court determines that reasonable persons might reach a different conclusion, then the district judge erred in granting the motion and the jury verdict should be reinstated.'[15]

A motion for new trial, the court noted, requires a less stringent test than review of a grant of JNOV, as "such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury."[16]

Indeed, T&B's first issue presented to the court made clear what was in contention, asserting that the

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[15] Pet. for Cert. App. 38, 927 So. 2d at 498-99, quoting *Trunk v. Med. Center of La. at New Orleans*, 885 So. 2d 534, 537 (La. 2004).

[16] Pet. for Cert. App. 47, 927 So. 2d at 502, citing *Davis v. Wal-Mart Stores, Inc.*, 774 So. 2d 84 (La. 2000).

trial court usurped the jury's fact-finding function and ignored substantial record evidence.[17]

It is against this backdrop that the court began its work. To assess T&B's claim that the JNOV ignored substantial record evidence and its claim that a "reasonable jury" could have exonerated it,[18] the court – with a full trial record before it – closely examined that evidence. It began by considering the trial testimony of several critical liability witnesses (Excel's William Philyaw, and Kaiser's Ken Scannapiego and John Scanova), and observed that it was the jury's prerogative to assess the credibility of these witnesses.[19]

The court then noted that the jurors physically handled the allegedly defective product (the sticky back), and that they "could decide for themselves" whether its limitations should have been obvious to Philyaw (i.e., whether their verdict was reasonable).[20] The court went on to consider Kaiser-AXA and Hayes's claim that the product was defective because of a deficient warning, and examined the trial testimony of Kaiser's expert (Jerry Householder), and T&B's expert (Jerry Purswell).[21] After considering that testimony, the court concluded that "[a] reasonable jury could

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[17] Pet. for Cert. App. 33, 927 So. 2d at 496.

[18] Pet. for Cert. App. 39, 927 So. 2d at 499.

[19] Pet. for Cert. App. 40-41, 927 So. 2d at 499-500.

[20] Pet. for Cert. App. 41-42, 927 So. 2d at 500.

[21] Pet. for Cert. App. 42, 927 So. 2d at 500.

have decided that a sticky-back, like a nail, does not need the kinds of warnings that Kaiser-AXA argues for."[22]

Lastly, the court of appeal examined Kaiser-AXA and Hayes's claim that the district court was correct to apportion 25% of the fault to T&B, based on their arguments on the merits of the evidence. The court dismissed that contention, but only after closely analyzing the various roles of the instrumentalities causing the explosion, and concluding that unlike Excel (the electrical contractor), T&B could "not have knowr the risk created by the proximity between the CT leads and the high-voltage bus bars." And more: "[S]ince Philyaw . . . never saw any of the warnings or instructions . . . the jury could reasonably find that any alleged deficiency in [them] was not a proximate cause of any of the events."[23]

The court ultimately concluded that the jury's verdict was eminently reasonable: "Considering all of the above factors, we conclude that 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions'" from those advanced by petitioners.[24] On that basis, it reversed the district court's grant of JNOV, and similarly reversed the district court's conditional grant of a new trial.

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[22] *Id.*

[23] Pet. for Cert. App. 44, 927 So. 2d at 501.

[24] Pet. for Cert. App. 44-45, 927 So. 2d at 501.

It is difficult to reconcile Kaiser-AXA and Hayes's claim that the evidence supporting the jury's verdict has never been examined on appeal with the court's detailed discussion of that very evidence. Properly stated, what Kaiser-AXA and Hayes complain of is not that the jury verdict has never been reviewed, but that it was not reviewed in the context of a direct appeal of the verdict – a distinction without a difference. The jury's verdict, and the evidence that supported it, was thoroughly reviewed by the court of appeal. It had to be – how could the court possibly assess the "reasonableness" of the verdict (required in both the JNOV and new-trial analyses) without a consideration of the entire body of evidence?

In short, Kaiser-AXA and Hayes's claim that "[t]he merits of the verdict have never been addressed . . . ," and that T&B's appeal did not involve a consideration of the merits of the jury verdict,[25] reveals a startling misapprehension of the underlying proceedings. This Court should not be similarly beguiled.

5. A second appeal, under a manifest-error standard of review, would serve no legitimate purpose and would be a waste of judicial resources.

As alluded to above, part of Kaiser-AXA and Hayes's displeasure with the proceedings in the state court seems to revolve around the notion that they

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[25] Pet. for Cert. 13.

have been prejudiced because the jury's verdict was not assessed under the "applicable standards." Yet nowhere do they articulate what that standard would be, and how such a review would be substantively different from the review conducted by the court of appeal.

Under Louisiana law, a jury's findings cannot be overturned unless manifestly erroneous or clearly wrong.[26] Taken to its logical endpoint, what Kaiser-AXA and Hayes suggest to this Court is that a verdict that has already been found to be "reasonable," is somehow also "manifestly erroneous." This point is studiously avoided in the petition because of its patent absurdity. The jury's verdict was validated under both the more stringent JNOV standard and the less stringent new-trial standard. Under both standards, it was found to be amply supported by the evidence. Kaiser-AXA and Hayes offer this Court no explanation how a second appellate review of the verdict under the manifest-error standard could possibly yield a different result. They do not because they cannot.

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[26] *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989): "It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable."

The court of appeal thoroughly vetted the challenged verdict under standards of review more advantageous to Kaiser-AXA and Hayes than what they now seek. Finding constitutional error under these circumstances is simply inconceivable.

CONCLUSION

The petition for certiorari suffers from a fatal infirmity: petitioners' failure to raise any substantial issue of federal law timely in the state courts. Their belated attempt to do so did not come until their unauthorized motion for rehearing in the Louisiana Supreme Court. This alone is enough reason to deny the petition without any further consideration. T&B suggests that the Court do just that.

Respectfully submitted,

LOUIS C. LACOUR, JR.,
Counsel of Record
ADAMS AND REESE LLP
701 Poydras Street
Suite 4500
New Orleans, LA 70139
Tel: (504) 581-0328

RAYMOND PETER WARD
ADAMS AND REESE LLP
701 Poydras Street
Suite 4500
New Orleans, LA 70139
Tel: (504) 585-0339

ERNEST P. GIEGER, JR.
ANDREW A. BRAUN
GIEGER, LABORDE &
LAPEROUSE, LLC
701 Poydras Street
Suite 4800
New Orleans, LA 70139
Tel: (504) 561-0400

ROBERT E. WINN
JOY GOLDBERG BRAUN
SHARON CORMACK MIZE
SESSIONS, FISHMAN,
NATHAN & ISRAEL, LLP
201 St. Charles Ave.
Suite 3500
New Orleans, LA 70170
Tel: (504) 582-5200

App. 1

SUPREME COURT OF LOUISIANA

Docket No.

IN RE:
GRAMERCY PLANT EXPLOSION AT KAISER

On application for Supervisory Writ of Certiorari or Review from the Fifth Circuit Court of Appeal for the State of Louisiana
Docket No. 07-C-893

On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James
State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

Original Writ Application Filed on Behalf of Respondents/Appellants Terrance Hayes, Kaiser Alumina & Chemical Corporation/ AXA Global Risks, et al.

Counsel for Kaiser/AXA:
Thomas G. Wilkinson
La. Bar No. 2184
Michael P. Ciaccio
La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

Counsel for Terrance Hays
Walter Dumas,
La Bar No. 5163
Dumas &
Associates Law Corp.
The Lawyer's Complex
1261 Government Street
Baton Rouge, Louisiana
70821

Caleb H. Didriksen,
La. Bar No. 1334
Diane R. Cosenza,
La. Bar No. 4419
Richard J. Garvey, Jr.,
La. Bar No. 20822
Loyd J. Bourgeois, Jr.,
La. Bar No. 29771
Amanda K. Wingfield,
La. Bar No. 30800
DIDRIKSEN LAW FIRM
3114 Canal Street
New Orleans, Louisiana
70119
Tele: (504) 586-1600
FaX: (504) 822-3119

Counsel for Appellants, Terrance Hayes, AXA Global Risks (U.K.) et al, suing on their own behalf and in the name Kaiser Alumina & Chemical Corporation

Civil Case

Volume 1 of 2

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

No. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

In re: Gramercy Plant Explosion at Kaiser

VS.

Thomas and Betts Corporation

Applicant: Kaiser/AXA and Terrance Hayes

Have there been any other filings in this Court in this matter? ☑ Yes ☐ No

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE
LITIGANT INFORMATION

APPLICANT:

Name: Caleb H. Didriksen, Esquire/
Walter Dumas, Esquire

Address: 3114 Canal Street/
1263 Government Street
New Orleans, LA 70119/
Baton Rouge, LA 70821

PhoneNo. (504) 586-1600 Bar Roll No. 1334

RESPONDENT:

Name: Louis C. Lacour, Jr., Esquire

Address: 4500 One Shell Square
New Orleans, LA 70139

PhoneNo. (504) 592-3234 Bar Roll No. 14102

Pleading being filed: ☐ In proper person.
☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection,
☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile,
☐ Other

☐ CINC, ☐ Termination, ☐ Surrender,
☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commission/
Hearing Officer: _____

Date of Ruling: _____

DISTRICT COURT INFORMATION

Parish and Judicial
District Court: 23rd Judicial District
Court, Parish of St. James

Docket No. 25,975

Judge and Section: Hon. Pegram Mire, Division D

Date of Ruling/Judgment: October 10, 2007

APPELLATE COURT INFORMATION

Circuit: Fifth Docket No. 07-C-893

Action: Writ granted, Reversed motion for new trial, Dismissed appeal

Applicant in
Appellate Court: Thomas & Betts Corporation

Filing
Date: Nov. 8, 2007

Ruling Date: Jan. 30, 2008

Panel of Judges: Hon. S. Chehardy,
Hon. M. Edwards,
Hon. G. Guidry

En Banc: ☐

REHEARING INFORMATION

Applicant:	Date Filed:	Action on Rehearing:

Ruling Date:	Panel of Judges:	En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/
Trial Scheduled date: If new trial is reinstated, pre-trial status.

☐ Trial in Progress, ☑ Post Trial

If there a stay now in effect? No

Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to the filing. I further certify that a copy of

this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

2/28/08 /s/ Caleb Didriksen
DATE SIGNATURE

List of all parties and counsel

For Applicants:

DUMAS & ASSOCIATES LAW CORPORATION
Walter Dumas, La Bar No. 5163
The Lawyer's Complex
1261 Government Street
P.O. Box Office 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Counsel for Terrance Hayes

and

Thomas G. Wilkinson, La. Bar No. 2184
Michael P. Ciaccio, La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

DIDRIKSEN LAW FIRM
Caleb H. Didriksen, La. Bar No. 1334
Diane R. Cosenza, La. Bar No. 4416
Richard J. Garvey, Jr., La. Bar No. 20822
Loyd J. Bourgeios, La. Bar No. 29771
Amanda K. Wingfield, La. Bar No. 30800
3114 Canal Street

New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Counsel for:
AXA GLOBAL RISKS (U.K.),
ALLIANZ INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
COMPAGNIE TRANSCONTINENTALE
DE REASSURANCE,
HOUSTON CASUALTY COMPANY,
LEXINGTON INSURANCE COMPANY,
MUNICH REINSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
QATAR INSURANCE COMPANY,
Q.B.E. INTERNATIONAL INSURANCE, LTD.,
SOREMA INSURANCE COMPANY,
SWISS REINSURANCE COMPANY,
WINTERTHUR INTERNATIONAL
INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

For Respondents:

ADAMS & REESE
Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
4500 One Shell Square
New Orleans, LA 70139

GIEGER, LABORDE & LAPEROUSE, LLC
Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
4800 One Shell Square
New Orleans, LA 70139

SESSIONS, FISHMAN & NATHAN, LLP
Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

Counsel for Thomas & Betts

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing pleading has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 28th day of February, 2008:

Division D
23rd Judicial District Court for the
Parish of St. James
St. James Parish Courthouse
5800 LA 44
Convent, Louisiana 70723

Clerk for the Louisiana Fifth Circuit Court of Appeals
101 Derbigny Street
Gretna, Louisiana 70053

Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
ADAMS & REESE
4500 One Shell Square
New Orleans, LA 70139

Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139

Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

/s/ Caleb Didriksen
DIDRIKSEN LAW FIRM

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Appendix 2: Ruling of the Louisiana Fifth Circuit Court of Appeal in No. 07-C-893 (reversing trial court's grant of a new trial and dismissing Kaiser/AXA and Hayes' appeal)

WRIT GRANT CONSIDERATIONS IN THE PRESENT CASE

There are several writ grant considerations in the present case that weigh strongly in favor of granting this writ application, which include conflicting decisions between the Louisiana Fifth Circuit Court of Appeal, the Louisiana First Circuit Court of Appeal, the Louisiana Fourth Circuit Court of Appeal, the Louisiana Supreme Court and the United States Supreme Court on the same legal issues. There is at least one significant unresolved issue of law that should be addressed by this Court, that of whether the statutory right to file a new trial motion is an empty right after or in conjunction with a JNOV that is reversed. The Fifth Circuit granted a supervisory writ in this matter, reversing its two prior judgments, and held that res judicata barred the trial court's grant of a new trial in this matter and also blocked an appeal of the jury's verdict. The only decision on the merits in this case is the judgment adopting the jury verdict, which has never been appealed.[1] Louisiana Supreme Court Rule X "Erroneous Interpretation or Application of Constitution or Laws" is also implicated by the Fifth Circuit's erroneous application of the res judicata statute, as it will deprive Hayes and Kaiser/AXA of their right to appeal the jury verdict.

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[1] Appendix 2.

1. Conflicting Decisions

The Fifth Circuit's newest decision in this matter **creates conflicts between the Fifth, First and Fourth Circuits, fails to follow controlling Supreme Court law, and conflicts with prior case law in this case.** The Fifth Circuit's decision also conflicts with the **Civil Law Treatise** which cites *Juno v. Morgan*, a First Circuit decision, for the proposition that "the judgment on the jury verdict was 'procedurally in abeyance' when the appeal [of the JNOV] was lodged." 1 La. Civ. Law Treatise § 13.4, n.21 (2006).

The Fifth Circuit denied Kaiser/AXA and Hayes' motion for a new trial, which conflicts with the following authorities: *In re: Gramercy Plant Explosion at Kaiser*, (prior judgment in this case dismissing appeal of Kaiser/AXA due to lack of trial court judgment – requiring trial court to enter judgment on January 16, 2007);[2] *In re: Gramercy Plant Explosion at Kaiser*, (consent judgment in this case dismissing unlodged appeal of Hayes pending trial court issuance of replacement judgment dated September 4, 2007);[3] *Horton v. Mayeaux*, 2005-1704 (La. 05/30/06), 931 So. 2d 338 (discretionary new trials are truly discretionary with trial court); *Carlone v. Carlone*, 444 So. 2d 1274 (La. App. 4 Cir. 1984) (a second new trial can be ordered as there is no statutory prohibition of

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[2] Exhibit C.

[3] Exhibit E.

a new trial on a new judgment); *State ex rel Land v. Martin*, 21 So. 2d 481 (La. 1945) (an order granting or denying a new trial is an interlocutory judgment); *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152 (a party cannot appeal a jury verdict while a JNOV is on appeal); *Strain v. Indiana Lumberman's Mut. Ins. Co.*, 2000-2720 (La. App. 1 Cir. 02/20/02), 818 So. 2d 144; *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 02/20/02), 813 So. 2d 458).

The Fifth Circuit held that both the issue of a new trial and an appeal of the jury verdict were barred by res judicata, which conflicts with the following authorities: *In re: Gramercy Plant Explosion at Kaiser*, (prior judgment (January 16, 2007) in this case dismissing appeal of Kaiser/AXA due to lack of trial court judgment – requiring trial court to enter judgment);[4] *In re: Gramercy Plant Explosion at Kaiser*, (consent judgment of September 4, 2007 in this case dismissing unlodged appeal of Hayes pending trial court issuance of replacement judgment dated September 4, 2007)[5], *Carlone*, 444 So. 2d 1274 (a second new trial can be ordered as there is no statutory prohibition of a new trial on a new judgment); *Martin*, 21 So. 2d 481 (an order granting or denying a new trial is an interlocutory judgment); *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152; *Strain v. Indiana Lumberman's Mut.*

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[4] Exhibit C.

[5] Exhibit E.

Ins. Co., 2000-2720 (La. App. 1 Cir. 02/20/02), 818 So. 2d 144; *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 02/20/02), 813 So. 2d 458) (the jury's verdict can not [sic] be appealed during the appeal of the JNOV as the jury's verdict is vacated by the entry of the JNOV). *State v. Shaddinger*, 97-439 (La. App. 5 Cir. 10/28/97), 702 So. 2d 965 (res judicata only applies to ***final*** judgments ***on the merits*** and not to interlocutory judgments).

The Fifth Circuit's latest decision reversed the trial court's grant of a new trial and denied Hayes and Kaiser/AXA the right to appeal the jury verdict on the grounds of res judicata. This decision conflicts with the principles of res judicata. The Fifth Circuit ignored its previous decision that it rendered on January 16, 2007, which dismissed Kaiser/AXA's appeal until the trial court entered a judgment incorporating the jury verdict.[6] The Fifth Circuit also rendered a consent judgment on September 4, 2007, which specified that dismissal of Hayes' appeal, was "without prejudice to refile after the entry of a replacement judgment by the trial court."[7] Thus, the Fifth Circuit chose to reverse itself from its last two decisions in the case.

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[6] Exhibit C.

[7] Exhibit E.

2. Significant Unresolved Issues of Law

A court of appeal has decided, or sanctioned a lower court's decision of, a significant issues [sic] of law which have not been, but should be, resolved by this court. According to the Fifth Circuits [sic] rulings herein, if a JNOV is reversed: (1) any alternative new trial order is automatically reversed; and (2) there is no right to appeal the jury verdict.[8] This ruling conflicts with *Horton*, *Junot*, *Strain*, *Delco*, and Louisiana statutory law, and creates the following questions of law that should be addressed by this Honorable Court:

1. Does *Horton* apply equally to alternative new trials ordered in connection with a JNOV?

2. If second new trials are permissible under *Carlone*, then res judicata cannot apply to a second new trial.

3. Should the Fifth Circuit decision, which stated that there can be no new trial under any circumstances when a JNOV is reversed be allowed to stand, even though it conflicts with the legislative intent as evidenced by the Code of Civil Procedure, which provides for the opposite result?

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[8] Appendix 2.

3. Erroneous Interpretation

Supreme Court Rule X "Erroneous Interpretation or Application of Constitution or Laws" is also present herein. The Fifth Circuit's decision to erroneously apply the res judicata statute, La. R.S. § 13:4231 will cause material injustice as it will operate to deprive Hayes and Kaiser/AXA of their constitutionally protected right to appeal the adverse jury verdict.

STATEMENT OF THE CASE

This case involves a massive short circuit and explosion at the Kaiser Gramercy plant on July 5, 1999 that caused injuries to thousands of people, including applicant Terrance Hayes, who was blinded, and caused nearly half a billion dollars in losses to Kaiser Alumina and Chemical Corporation, severe injuries to others, including massive life threatening burns to some and more minor injuries to thousands of others. Plaintiffs filed suit against Thomas and Betts ("T&B") in 2000 because the short circuit was caused by the failure of adhesive backed mounts which were designed, manufactured, and sold by T&B. When the T&B mounts failed in normal service, they allowed a low voltage instrument line to contact an 8,000 volt bus bar, which caused a short circuit, and a power failure at the Kaiser plant at night. The Kaiser workers, searching in the dark, were unable to find the source of the power outage fast enough to avoid the explosion.

The matter was tried to a jury, which, through various errors, concluded that T&B was not at fault. The trial court presided over the six week trial, heard and evaluated the evidence, and was well aware of the errors that occurred at trial. The trial court granted a JNOV in favor of Kaiser/AXA and Hayes, found Kaiser/AXA lost $335,000,000 in the event, and Hayes [sic] loss was $20,000,000, and allotted 25% of the fault to T&B, which resulted in a judgment of $88,750,000 million plus interest and costs, for a total judgment of over $120,000,000. The Fifth Circuit reversed the JNOV and conditional new trial in 2006. *In re: Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 03/28/06), 927 So. 2d 492. In late 2006 or early 2007, the appeal of the jury verdict was lodged with the Fifth Circuit.[1] Before briefs were filed, the Fifth Circuit dismissed the appeal on the basis that the record lacked any judgment of the trial court adopting the jury verdict, but mentioned that this could be easily remedied at the trial court level.[2] On September 4, 2007, the Fifth Circuit Chief Judge ordered a dismissal of Hayes' unlodged appeal without prejudice to refile after the trial court replaced the judgment adopting the jury verdict.[3] In 2008 the Fifth Circuit reversed its 2007 judgments and held that there can never be an appeal of the jury verdict, and that the trial court should not have entered a

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[1] Exhibit A.

[2] Exhibit C.

[3] Exhibit E.

judgment adopting the jury verdict in accordance with its own two 2007 judgments, including the consent judgment dated September 4, 2007, and that the new trial should not be granted on the basis of res judicata, again failing to address the legal standard enunciated in *Horton v. Mayeaux.*[4] 2005-1704 (La. 05/30/06), 931 So. 2d 338.

This writ application principally seeks reversal of two issues raised by the most recent Fifth Circuit decision in this matter:

1. Does res judicata apply to this matter and to a subsequent new trial order, or is prior jurisprudence, including *Carlone* and *Horton* valid?

2. Does res judicata automatically prevent any appeal of a jury verdict when a JNOV is reversed?

Applicants request that this court grant their writ because the January 30, 2008 Fifth Circuit decision conflicts with its own prior decisions, Louisiana statutory law, and prior jurisprudence and so should be addressed by this court. The January 30, 2008 Fifth Circuit opinion reversing the new trial order closed with:

> On this basis [res judicata], we hereby grant Thomas and Betts' writ application, reverse the trial court's judgment granting

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[4] Appendix 2.

> respondents' a new trial, and deny respondents' motions for new trial.[5]

Buried within the body of the decision, is a clear violation of plaintiffs' constitutional right to appeal:

> Thus, as of June 14, 2006 [the date the Supreme Court denied writs on the reversal of the JNOV], the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or **any other issue.**[6]

Importantly, the Fifth Circuit had already ruled in the opposite fashion in this case, against T&B, on the res judicata issue on January 16, 2007,[7] and denied rehearing on February 23, 2007. *In re: Gramercy Plant Explosion at Kaiser*, 06-871 (La. App. 5 Cir/ 02/23/07), 2007 La. App. LEXIS 294. The Supreme Court denied T&B's writ on April 5, 2007. *In re: Gramercy Plant Explosion at Kaiser*, 2007-0544 (La. 04/05/07), 954 So. 2d 132. The Fifth Circuit's dismissal of Applicants' appeal that T&B challenged read:

> Mover, Thomas & Betts Corp. ("T&B"), seeks to have us dismiss Kaiser-AXA's appeal on the basis that all issues are res judicata pursuant to our prior opinion, *In re Gramercy. Plant Explosion at Kaiser*, 04-1151

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[5] Appendix 2.

[6] Appendix 2 **(emphasis added)**.

[7] Exhibit C.

(La. App. 5 Cir. 3/28/06), 927 So.2d 492, *writ denied*, 2006-1003 (La. 9/1/06), 936 So.2d 190. In our previous opinion, however, we only addressed the issues of whether the trial court erred in granting a JNOV and new trial in favor of Kaiser-AXA; we reversed the judgment of the district court and reinstated the jury verdict, and the Louisiana Supreme Court subsequently denied writs.

Citing to the First Circuit's opinion in *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152, Kaiser asserts that its first opportunity to appeal the jury's verdict came after the supreme court denied writs from our opinion which reinstated the jury verdict, allowing for all further proceedings or appeals as provided by law.

LSA-C.C.P. art. 2082 provides that an appeal can only be taken from a judgment of a trial court. In the present case, **without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court.**

Accordingly, for the foregoing reasons, T&B's Motion for Dismissal is granted.[8]

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[8] Exhibit C.

There has never been an appeal of the jury verdict, even though the most recent judgment from the Fifth Circuit provides that there can never be such an appeal. The jury verdict of 2001-2002 was vacated by the entry of the JNOV. Therefore, it was not and could not be appealed.[9] T&B appealed the JNOV. The JNOV and alternative new trial from the 2002 judgment was reversed on March 28, 2006. *In re: Gramercy*, 04-1151, p. 3, 927 So. 2d at 494. After the JNOV was reversed, Kaiser/AXA filed a devolutive appeal from the jury verdict, as Kaiser/AXA assumed that the Fifth Circuit decision of March 28, 2006 constituted the rendering of a judgment on the jury verdict. On motion of T&B, the Fifth Circuit dismissed the devolutive appeal of the jury verdict on the grounds that there was no trial court judgment to appeal. As per *Junot*,[10] the 2002 judgment incorporating the jury verdict had been vacated, and no new judgment incorporating the jury verdict was entered. T&B, happy with the dismissal, but unhappy with the reasons for the dismissal, moved for rehearing of the dismissal and for writs to the Supreme Court on the basis that res judicata barred any further trial court action and the appeal. Both the Fifth Circuit and the Supreme Court left the January 16, 2007 decision as it was, and the Fifth Circuit found res judicata did not apply. Both the January 16, 2007 and

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[9] See discussion on pgs. 14-16 under *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152.

[10] *Id.*

the September 4, 2007 Fifth Circuit orders clearly anticipate the entry of a trial court order adopting the jury verdict. The 2008 Fifth Circuit decision states the opposite of its own January 16, 2007 and the September 4, 2007 decisions in this same case, and denies Applicants any right to appeal the jury verdict.[11]

When the devolutive appeal of the jury verdict was dismissed for lack of a trial court judgment, with advice that the lack of a judgment could be remedied by the trial court, the Fifth Circuit effectively remanded this matter back to the trial court for entry of judgment in conformance with the jury verdict. T&B admitted in open court that the trial court had jurisdiction on May 14, 2007 to enter a new judgment incorporating the jury verdict: [sic]

T&B acknowledged in open court on May 14, 2007 that the trial court now had jurisdiction to enter a judgment on the jury's verdict:

> THE COURT:
>
> > Are you saying that now I have jurisdiction over it since your writs are completed?
>
> MR. WARD:
>
> > That would be – well, we still have the problem with Mr. Hayes. Kaiser is

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[11] Appendix 2, Exhibit C.

properly before you at this point, I guess, on that issue . . .

MR. WARD:

. . . Your Honor, there's an easy was to straighten this out. The first thing, Mr. Hayes needs to file in the Court of Appeal a Motion to Dismiss an Unlodged Appeal. There is such an animal.

THE COURT:

Correct.

MR. WARD:

It's procedurally possible. He can do that. That will take care of that.

THE COURT:

I agree.

MR. WARD:

The next thing that happens, you sign another judgment on the verdict after we try to work that, and, if necessary, maybe have a contradictory hearing on that. Then, we can go forward. If they want to bring whatever motions they want to bring following that, that would be the way to do that.

T&B then provided the trial court with its own choice of form for that judgment on August 22, 2007.[12] On September 4, 2007, just six months ago, T&B also

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[12] Exhibit D, letter from T&B counsel to Trial Court requesting entry of judgment and attached form.

consented to a Fifth Circuit order dismissing Hayes' unlodged appeal without prejudice to refile after a replacement judgment would be ordered by the trial court.[13]

T&B's own form of new judgment incorporating the jury verdict was entered on September 4, 2007 after Hayes' unlodged appeal was dismissed, as requested by T&B. On September 5, 2007, Hayes and Kaiser/AXA filed timely motions for new trial from the new judgment.[14] The trial court received briefs and heard arguments from all parties. On October 10, 2007, the trial court granted a new trial on purely discretionary grounds as per this court's holding in *Horton v. Mayeaux*.[15] T&B filed a writ application to the Fifth Circuit based on res judicata, which had already been rejected by all Louisiana trial and appellate courts in this case. The Fifth Circuit, which had rejected T&B's identical arguments last year, reversed themselves and accepted T&B's arguments this year, and reversed their own decision of one year ago.[16] This writ application is from the Fifth Circuit's grant of T&B's 2007 writ, in which the Fifth Circuit reversed the grant of a new trial and any appeal

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[13] Exhibit E.

[14] *Id.*

[15] Appendix 1.

[16] Appendix 2.

based upon res judicata, a ground that it previously rejected in this same case.[17]

Res judicata only applies following a final judgment on the merits. La. R.S. § 13:4231 cmt. (d) (2007); *Tolis v. Bd. of Supervisors of LSU*, 95-1529, p. 2-3, (La. 10/16/95), 660 So. 2d 1206-07, *citing* La. Code of Civ. Pro. art. 1841. Res judicata should not apply herein, as there has never been a *final* judgment on the jury verdict, as Applicants' appeal of the jury verdict was lodged after the JNOV was reversed, but has never been briefed or argued.[18] In 2007, the Fifth Circuit dismissed Plaintiffs' appeal just before briefs were due based upon the lack of a trial court judgment adopting the jury verdict.[19] The JNOV reversal related to the appellate process was completed, but the appeal of the jury verdict had not yet taken place. The JNOV reversal was not a **final** judgment on the **merits** of the jury verdict, as the jury verdict had not been in effect or appealed, and was not yet briefed. Different legal standards of review apply to appeals of jury verdicts and to JNOVs.

The Fifth Circuit erred in its order, as new trial orders are interlocutory judgments, so they are not subject to the res judicata defense. *Simmons v. Beauregard Parish School Bd.*, 284 So. 2d 668, 669

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[17] Appendix 2.

[18] See discussion at pgs. 14-16, under *Junot*, 2001-0237, 818 So. 2d 152.

[19] Exhibit C.

(La. App. 3 Cir. 1973), *citing* Official Revision Comments, LSA-C.C.P. Art. 2083; *Foster v. Kaplan Rice Mill*, 203 La. 245, 13 So. 2d 850 (La. 1943); *Pate v. Crescent City Motors Exchange, Inc.*, 256 So. 2d 471 (La. App. 4 Cir. 1972).[20] The Fifth Circuit also erred in holding that res judicata applies to all aspects of this case, effectively denying applicants any right to appeal the adverse jury verdict. The merits of the jury verdict have never been considered by any appellate court.

ASSIGNMENT OF ERRORS

1. The Fifth Circuit erred in determining that its 2006 decision reversing the trial court's JNOV was a final judgment, such that the doctrine of res judicata could be applied to prohibit any appeal of the jury verdict.

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[20] Likewise, the Louisiana Supreme Court has specifically stated, "It is well settled that a judgment refusing a new trial is not appealable. It is not a final judgment and can produce no irreparable injury." *General Motors Acceptance Corp. v. Deep South Pest Control, Inc.*, 173 So. 2d 190, 191 (La. 1965), *citing State ex rel Land v. Martin*, 207 La. 410, 21 So. 2d 481 (La. 1945).

The Louisiana Supreme Court has further held that a judgment or an order granting a new trial is interlocutory and operates only as a postponement or continuance, and further, an order granting a new trial does not cause irreparable injury and no appeal (or writ) lies from an order granting a new trial in cases where the application for a new trial was timely filed. *Foster v. Kaplan Rice Mill*, 13 So. 2d 850, 852 (La. 1943).

2. The Fifth Circuit erred in reversing the trial court's decision to grant a new trial and in denying Hayes and Kaiser/AXA's motion for a new trial, and in reversing the trial court's entry of a new judgment incorporating the jury verdict (as it has been ordered to do by the Fifth Circuit).

SUMMARY OF THE ARGUMENT

This writ application is filed on behalf of Hayes, Kaiser and AXA, and seeks the reversal of the Fifth Circuit decision reversing the trial court's grant of a discretionary new trial and denying a new trial, and ordering that there can never be an appeal of the jury verdict, on the basis of res judicata.

This case itself has conflicting and contradictory decisions from the Fifth Circuit. Not only are there contradictions between the circuits, there are contradictions by the Fifth Circuit in this very case. The January 16, 2007 decision in this case stated that there was no trial court judgment from which to appeal, and stated that situation could easily be remedied. The September 4, 2007 consent dismissal of Hayes unlodged appeal specifically reserved Hayes' right to file his appeal after the trial court entered the replacement judgment.[21] Contradicting its own prior orders on the subject, the judgment from which

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[21] Exhibit E.

this writ is taken states that a reversal of a JNOV alone is a final judgment on the merits that automatically prevents any appeal of the jury verdict.

A conflict exists in the jurisprudence concerning discretionary new trials. This Court declared in *Horton* that a trial judge has almost unlimited discretion to order a new trial, as long as reasonably articulated reasons are given. *Horton*, 2005-1704, p. 10, 931 So. 2d at 344, *citing Burris v. Wal-Mart Stores, Inc.*, 94-0921, p. 11 (La. App. 1 Cir. 03/03/95), 652 So. 2d 558, 562, *writ denied*, 654 So. 2d 562 (La. 1995). In this matter, the Fifth Circuit ruled that no new trial can be granted for any reason in the event that a JNOV is overturned.[22] There is no statutory support for this proclamation by the Fifth Circuit, only jurisprudential support, and this jurisprudence conflicts with statutory law, so it should be reversed or limited. The Fifth Circuit's 2006 decision on conditional new trial also appears to have been overruled by *Horton v. Mayeaux. In re: Gramercy*, 04-1151, 927 So. 2d 492. Both of these subjects are areas of law that would benefit by clear standards being set by this Honorable Court.

Assignment of Error No: 1

Res Judicata

The Supreme Court has repeatedly ruled on res judicata motions and appeals since the mid-1800s. It

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[22] Appendix 2.

is generally a well-established body of law. Neither the law nor the jurisprudence support what the Fifth Circuit has just done.

> The doctrine of **res judicata** precludes subsequent litigation when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is **final**; (3) the parties in the two matters are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.[23]

One of the initial obvious differences between this case and those covered by the general rule of res judicata is that this is not a second suit. We are still in the middle of the original suit. The appeal of the jury verdict, which was lodged and pending, but not yet briefed or argued, was dismissed pending entry of a judgment by the trial court.[24] The Chief Judge of the Fifth Circuit, with the consent of all parties, dismissed Hayes' unlodged appeal without prejudice to

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[23] *Burguieres v. Pollingue,* 02-1385, p. 8 (La. 2/25/03), 843 So. 2d 1049, 1053, *citing* La. R.S. 13:4231; *see also Ken Smith, et al. v. State, DOTD c/w Ken Smith, et al. v. Mike Unkel,* 2004-1317 *c/w* 2004-1594 (La. 03/11/05); 899 So. 2d 516, 529; *See also Wooley v. State Farm Fire & Cas. Ins. Co.,* 04-0882, (La. 01/19/05); 893 So. 2d 746.

[24] Exhibit C.

refile after the entry of judgment by the trial court.[25] The trial court's case numbers never changed. This is still the first suit. No new suit has been filed. "A final judgment is defined in LSA-C.C.P. art. 1841 as one that determines the **merits** in whole or in part. An interlocutory judgment is **defined** as one that does not determine the **merits** but only preliminary matters." *State v. Shaddinger,* 97-439, p. 9 (La. App. 5 Cir. 10/28/97), 702 So. 2d 965, 970 **(emphasis added)**.

The 2006 judgment reversing the JNOV has indicia of both final and interlocutory judgments. It was not an appeal of the jury verdict, it was only an appeal of the JNOV. A similar situation to that herein was considered by this court in 1951. *Oliphint v. Oliphint,* 54 So. 2d 18 (La. 5/28/51). A judgment that concerned merit issues that did not resolve all of the open issues in the case was rendered, appealed and decided, but it left open ongoing issues and appeals. *Id.* The case was not concluded, but the defendant urged that res judicata compelled an immediate dismissal. *Id.* The *Oliphint* court stated:

> It is, of course, true that the judgment is not a final judgment in the sense that it is the last judgment to be rendered in the case. Therefore, it cannot be said to fit exactly within the definition of

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[25] Exhibit E.

> definitive judgments contained in Article 539 of the Code of Practice. On the other hand, it is apparent that it cannot be regarded as an interlocutory judgment, as defined by Article 538 of the Code of Practice, since it trenches upon the merits of the case and does not merely pronounce on preliminary matters in the course of the proceedings. Albeit, the judgment falls within that zone of decrees which are not defined in the Code of Practice but which really partake of final judgments in that they dispose of issues applicable solely to the merits of the case. The omission of provisions in the Code of Practice relative to this type of judgment has been heretofore commented upon by this court in a number of cases and **appeals from such judgments have been sanctioned.**

Id. at 789-90; *see Cary v. Richardson,* 35 La. Ann. 505 (La. 1883); *Garland v. Dimitry,* 114 So. 2d 718 (La. 1927).

Violation of Applicants' Right to Appeal

The plaintiffs' appeals in this case were pending and lodged, but were not yet briefed or argued at the time T&B's motion to dismiss was granted. In addition to the directive provided by the Fifth Circuit to the trial court and litigants to enter a new judgment

on the jury verdict in its 2007 dismissal of the appeal,[26] the Fifth Circuit, with the consent and concurrence of T&B, provided the following order to appellant Hayes and the trial court on September 4, 2007:

> IT IS ORDERED that the unopposed motion to dismiss unlodged appeal without prejudice to refile is granted, and the unlodged devolutive appeal of Terrance Hayes is dismissed without prejudice to refile after the entry of a replacement judgment by the trial court.
>
> Gretna, Louisiana, this 4th day of Sept., 2007.
>
> s/ Edwin Dufresne, Chief Judge"[27]

It is clear that the Fifth Circuit remanded this matter to the trial court for entry of judgment. When that new judgment was entered, a motion for new trial was filed, was later argued, heard, and granted. It cannot be reasonably questioned that the trial court was authorized and expected by the Fifth Circuit to enter a judgment in accordance with the jury verdict so that the matter could proceed in accordance with law. After entry, of a new judgment, the Code and jurisprudence permits the filing of a motion for new trial, and if not granted, the filing of the appeal. This Court has previously ruled that

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[26] Exhibit C

[27] Exhibit E

whenever there remain appeal rights that have not been exhausted, res judicata is inappropriate.

> We also find it significant that on June 10, 1992, the effective date of Act 237 of 1992, neither the judgment rendered by the trial court in *Rey,* nor that rendered by the trial court in *Segura,* were res judicata. Under the law of res judicata applicable in *Rey,*[34] "[a] final judgment is definitive when it has acquired the authority of the thing adjudged." La. C.C.P. art. 1842 (West 1990). "Thing adjudged" is defined in La. C.C. art. 3506(31) as "that which has been decided by a final judgment, ***from which there can be no appeal***, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal" (emphasis added). **Obviously, the trial court's judgment in *Rey* had not acquired the authority of a thing adjudged on June 10, 1992 because that judgment was then on appeal. Similarly, under the law of** res judicata **applicable in *Segura*, "a valid and final judgment is conclusive between the same parties, *except on appeal or other direct review. . .* "** La. R.S. 13:4231 (emphasis added).

> Because the trial court's judgment in *Segura* was on appeal on June 10, 1992, it was not conclusive-between the parties at that time.
>
> **In light of the foregoing, we conclude a claim is *pending* as long as it is *subject to judicial scrutiny.*** Even though a lower court has adjudicated a claim and rendered judgment, the claim continues to be pending until appeal of that judgment has been exhausted. Until then, something further remains to fix the plaintiff's right to enforce the claim as well as the defendant's obligation to pay it. In other words, a claim "pending appeal," as that phrase is commonly understood in a legal context, is a *pending* claim.

Segura v. Frank, 93-127 (La. 1/14/94), 630 So. 2d 714, 727 (emphasis in original).

Even though it did not do so herein, the Fifth Circuit has relied in the past on the analysis of the Supreme Court to *Segura v. Frank. See Mancuso v. Siegel,* 94-525, p. 7 (La. App. 5 Cir. 11/29/94), 646 So. 2d 1200, 1203-04. The situation we have herein, where the appeal of the jury verdict has never been completed because it was interrupted by a motion to dismiss based on res judicata, is far different from the *Tolis* case, which has been cited both by T&B and by the most recent Fifth Circuit panel herein:

> The intermediate court's judgment of March 29, 1994 dismissed plaintiffs' action in its entirety with prejudice, thereby deciding the merits of the case. That judgment was therefore a final judgment, which became res judicata and conclusive between the parties when it was rendered, although subject to modification by a higher court on direct review. La. Rev. Stat. 13:4231.

Tolis v. Board of Supervisors, 95-1529, p.3 (La. 10/13/95); 660 So. 2d 1206, 1207.

This Court has refused in the past to be lured-in by absurd "literal" readings of prior law:

> While a literal reading of La. Code Civ. P. art. 1673 would support Mr. Savoie's interpretation, we believe that construing an interlocutory judgment of dismissal based on venue as a final disposition on the merits would produce an absurd or unintended result under the facts of this case. The function of the court is to interpret the laws so as to give them the meaning which the lawmakers obviously intended them to have and not to construe them so as to give them absurd or ridiculous meanings. *Webb v. Parish Council of East Baton Rouge,* 217 La. 926, 47 So. 2d 718 (1950); *Smith v. Town of*

> *Vinton,* 209 La. 587, 25 So. 2d 237 (1946).
>
> The absurdity of a literal application of La. Code Civ. P. art. 1673 under the facts of this case is readily apparent . . . it has been held that this requirement is not satisfied when the merits of the underlying proceeding have not been reached. *See Irby v. Harrell,* 140 La. 828, 74 So. 163 (1917) (abandonment of prosecution as a result of a compromise is not the same as a termination of litigation in plaintiff's favor). Mr. Savoie's interpretation of La. Code Civ. P. art. 1673 would render this requirement meaningless and allow him to proceed on his malicious prosecution suit without a bona fide termination of the underlying proceedings.
>
> *Savoie v. Rubin,* 2001-3275, p.4 (La. 06/21/02), 820 So. 2d 486, 488.

This Court previously refused to allow courts of appeal to bar a plaintiff from appealing the trial court's judgment based upon res judicata.

> Granted. The court of appeal erred in finding principles of res judicata barred plaintiff from appealing the trial court's judgment. See La. R.S. 13:4231 ("a valid and final judgment is conclusive between the

> parties, except on appeal or other direct review"). The proper inquiry is whether relator voluntarily acquiesced in the trial court's judgment pursuant to La. Code Civ. P. art. 2085. Because the court of appeal did not consider this issue, we vacate the judgment of the court of appeal and remand the case to the court of appeal to determine, after appropriate briefing from the parties, whether relater's post-judgment actions constituted an acquiescence in the judgment.

Shadoin v. Shadoin, 2003-0042, p. 1 (La. 05/09/03); 847 So. 2d 1184.

This matter falls within one of the well-established exceptions to the general res judicata rules as previously outlined by this court:

> Although rarely mentioned, exceptions exist to the common law theory of res judicata, as noted in the Restatement (Second) of Judgments, § 26 (1982). These exceptions involve "exceptional circumstances" as where . . . **(c) there are restrictions on the subject matter jurisdiction of the courts** . . . Restatement (Second) of Judgments, § 26 (1982), pg 233-234, fn4.

Terrebonne Fuel & Lube v. Placid Ref. Co., 95-0654, p. 13 (La. 01/16/96); 666 So. 2d 624, 632 **(emphasis added)**.

There were restrictions on the subject matter jurisdiction of the Fifth Circuit at the time it concluded that the JNOV should be reversed, as the JNOV had replaced the only judgment on the merits in this case – the jury verdict. *See Junot,* 2002-0237, p. 3-4; 818 So. 2d at 156-157. The only matter before the Fifth Circuit at that time, and the only matter it could have decided in the posture of the case before it, was whether or not the JNOV should be affirmed or reversed. The Fifth Circuit concluded the JNOV should be reversed. *In re: Gramercy,* 04-1151, 927 So. 2d 492. That decision was challenged, and the challenge lost. The next step in the appeal process of this matter was to appeal the jury verdict, which had never been appealed. The Fifth Circuit ruled in 2007 that in order to perfect plaintiffs' appeals, the trial judge had to enter a judgment incorporating the jury verdict.[28] Both the 2007 panel and the Chief Judge signed judgments that made it clear that jurisdiction was returned to the trial court for entry of judgment[29] It is clear that the appeal process in this matter has never been completed and has additional steps, whether they begin with the new trial or recommence with the appeal.

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[28] Exhibit C.

[29] Exhibit E.

There are now four Fifth Circuit opinions in this matter related to the JNOV, appeal, and new trial issues that are inconsistent, dissonant and that cannot be harmonized.

1. March 28, 2006: The Fifth Circuit reversed the trial court's JNOV, conditional new trial, and reinstated the jury verdict. *In re: Gramercy*, 04-1151, 927 So. 2d 492.

2. January 16, 2007: The Fifth Circuit dismissed the plaintiffs' appeal before it was briefed due to absence of a trial court judgment from which to appeal and stated:

   > . . . an appeal can only be taken from a judgment of a trial court. In the present case, without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court."[30]

3. September 4, 2007: The Fifth Circuit dismissed Terrance Hayes' unlodged appeal without prejudice to refile it after the trial court was to enter a replacement judgment incorporating the jury verdict.

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[30] Exhibit C.

4. January 30, 2008: The Fifth Circuit granted T&B's writ, reversed the trial court's judgment granting new trial, denied Kaiser/AXA. and Hayes' motion for new trial, and stated:

> . . . our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged . . . the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or **any other issue**."[31]

There is no previous statutory or jurisprudential authority that a reversal of a JNOV and a conditional new trial operates as a final decision on the merits of a jury verdict sufficient to trigger res judicata and to deny any appeal of the jury verdict. This decision is res novae and conflicts with established jurisprudence and statutory authority.

The Louisiana Supreme Court has affirmed, that the doctrine of res judicata is triggered only by a ***final*** judgment ***on the merits***. *Tolis v. Bd. of Supervisors of LSU*, 95-1529, p. 2 (La. 10/16/95), 660 So. 2d 1206, 1206-07, *citing* La. Code Civ. Pro. art. 1841. The original jury verdict judgment was vacated by the trial court's JNOV, and T&B's appeal of the trial court's JNOV was not a consideration of the merits of

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[31] Appendix 2 (**emphasis added**).

the jury verdict. *Junot v. Morgan,* 2002-0237, p. 3-4 (La. App. 1 Cir. 02/20/02), 818 So. 2d 152,156-157.

Preservation of and Applicants' Right to Appeal the Jury Verdict

The standards on appeal of JNOVs and jury verdicts are two very different standards, and are applied differently. When this Court or the Fifth Circuit reviews the jury trial record for reversible error, which it has never done, it will apply a *different* standard of review than that which it applied to the question of the propriety of the JNOV. The differences between the two standards are significant. *De novo* review, which is available and may well be applied to this case, would not depend to any degree on the jury verdict, but instead depends upon the evidence presented at trial, and the law.

The right of appeal is favored in Louisiana law. *Allen v. State of Louisiana through the Earnest N. Morial – New Orleans Exhibition Hall Authority, et al*, 2002-1072 (La. 04/09/03), 842 So.2d 373, 376, footnote 2. The right of appeal is lost only through the unconditional, absolute, and voluntary acquiescence in the judgment by the appellant, and only if the appellant evidences an intention to abandon the right. *Id.*, citing *Succession of Franz,* 116 So.2d 267, 268 (La. 1959). To the contrary, Hayes and Kaiser/AXA here are actively pursuing their right to appeal and are actively challenging the faulty trial court jury verdict and judgment, and have not, in any way,

acquiesced in the judgment or abandoned their rights. As the Louisiana Supreme Court long ago stated, "[t]he right to appeal is a precious one, and it should be favored and aided by the court." *Fitzpatrick v. Letten,* 49 So. 494, 497 (La. 1908).

Louisiana Code of Civil Procedure article 2082 provides,

> Appeal is the exercise of the right of a party to have a **judgment of a trial court** revised, modified, set aside, or reversed by an appellate court.

La. Code Civ. Pro. art. 2082 (2008).

The judgment Hayes/Kaiser/AXA has the right to appeal (in the absence of a new trial), the trial court's judgment incorporating the jury verdict, was never subject to being revised, modified, set aside, or reversed by an appellate court, until now. The Fifth Circuit has now wrongly declared that plaintiffs will never have the right to appeal the jury verdict. Until the "appeal as of right" has been allowed and completed or the case is re-tried as per the trial judge's order, a **final judgment on the merits** of the case has not been rendered.

The January 16, 2007 Fifth Circuit opinion herein, cited *Junot v. Morgan,* 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152 and followed its ruling. *Junot* is directly on point. In *Junot,* the First Circuit considered a jury verdict that had been amended by the grant of plaintiffs' JNOV. *Id.* In the present case,

as in *Junot*, Plaintiffs' JNOV also included an alternative motion for new trial. The trial court granted plaintiffs' JNOV and reapportioned fault, with a higher fault assigned to defendant Burger King, and increased both plaintiffs' general damage awards. The trial court denied Burger King's JNOV, *Id.* Burger King suspensively appealed *both the original judgment and the JNOV. Id.* The appellate court *dismissed as premature Burger King's suspensive appeal of the jury verdict,* which had been superceded by the JNOV and the new trial ruling:

> Because the trial judge granted plaintiffs' motion for JNOV, the jury's verdict was set aside. See La. C.C.P. art, 1811. Thus, the August 29, 2000 judgment rendered in conformity with the trial judge's rulings superseded the February 11, 2000 judgment which incorporated the jury's verdict. As such, at the time this appeal was lodged, the February 11, 2000 judgment was procedurally in abeyance. Therefore, when Burger King lodged its appeal of the February 11, 2000 judgment, it was requesting of this court a review of a judgment which was procedurally in abeyance and without legal effect since it is a judgment which purports to incorporate a verdict that was "set aside."

Louisiana Civil Code of Procedure article 1811E states:

> If the motion for a [JNOV] is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for a [JNOV]. If the appellate court reverses the judgment, nothing in this Article precludes the court from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted. (Emphasis added.)

Thus, the party who prevailed on the JNOV at the trial court level – but whose favorable JNOV determination is subsequently reversed on appeal – may be the subject of a ruling in the trial court on new trial grounds at the direction of the court of appeal. It follows that it is premature for an appellate court to consider an appeal of the judgment which incorporates the set-aside verdict at the same time it reviews the propriety of the trial court's ruling on the motion for JNOV. To do so has the potential effect of terminating the post-judgment rights of the parties, for example, the right to a new trial ruling in the trial court under

> La. C.C.P. art. 1811 E. When Burger King lodged this appeal of the February 11, 2000 judgment, that appeal was premature.
>
> An appellate court may dismiss an appeal for lack of jurisdiction on its own motion at any time. See La. C.C.P. art, 2162. Therefore, ***we dismiss as premature Burger King's appeal of the February 11, 2000 judgment incorporating the jury's verdict as this judgment has been set aside by the judgment dated August 29, 2000.*** We now address Burger King's contentions challenging the rulings of the trial judge on the parties' motions for JNOV.[32]

The procedure outlined by *Junot* has become part of hornbook law taught to law students.

In 1 La. Civil Law Treatise § 13.4, n.21 (2006), the holding of *Junot* is cited for the proposition that "the judgment on the jury verdict was 'procedurally in abeyance' when the appeal is lodged and that it is premature to consider the appeal of the judgment on the set aside verdict at the same time as consideration of the JNOV."

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[32] *Junot*, p. 4-5, 818 So.2d at 156-57 (**emphasis added**). *See also Strain v. Indiana Lumberman's Mut. Ins. Co.*, 2000-2720 (La. App. 1 Cir. 2/20/02), 818 So.2d 144; and *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 2/20/02), 813 So.2d 458, *writ denied*, 2002-1125 (La. 6/14/02), 818 So.2d 779.

Under the clear holding of *Junot,* Hayes, and Kaiser/AXA were precluded from appealing the correctness of the jury verdict while the JNOV was on appeal. Upon the reversal of the JNOV and upon the entry of judgment incorporating the jury verdict by the trial court, Hayes and Kaiser/AXA obtained the right to move for a new trial and/or appeal the jury verdict.

Louisiana Law does not Mandate an Appeal of a Vacated Judgment

Louisiana Code of Civil Procedure article 2082 provides that an appeal is the exercise of the right of a party to have a **judgment** of a **trial court** revised, modified, set aside, or reversed by an appellate court. La. Code Civ. Pro. art. 2082 (2008). The 2006 appeal was filed to appeal the reinstated jury verdict, as it had never been subject to being revised, modified, set aside, or reversed by an appellate court until after the JNOV was reversed and the jury verdict was reinstated. Judgments adopting the jury's verdict were presented and signed in February, 2002. Timely motions for new trial and for JNOV were filed thereafter. Both the motions for new trial and for JNOV were granted, which vacated the jury verdict (as per *Junot*). After the JNOV and the new trial motions were granted, there was no judgment on the jury verdict available to appeal. The JNOV and the new trial ruling were in favor of Hayes and Kaiser/AXA. There was no appeal of the jury verdict, because there was no judgment on the jury verdict to appeal.

Contrary to T&B's assertion that the Fifth Circuit already considered all aspects of an appeal of this case, Hayes and Kaiser/AXA never had an opportunity to raise the errors committed by the court below at trial, such as improper jury venire, improper jury selection, improper evidentiary rulings, violation by T&B of evidentiary rulings, mischaracterization of testimony by counsel, obtaining opinion testimony from lay witnesses, denial of mistrial motions, improper jury instructions, and/or any other trial errors that helped justify *de novo* review and/or create the manifest error that occurred at trial. The analysis regarding these legal errors is different from the analysis required in supporting the affirmance of the JNOV and/or new trial. Without the opportunity to address the merits of the jury verdict, no *final* judgment on the "merits" of the case exists.

An appeal from the jury's verdict's not a subsequent action. Hayes and Kaiser/AXA have not filed a new lawsuit. They have been appealing and challenging the original jury verdict against them. The Fifth Circuit's reversal of the JNOV completed the appeal of the JNOV, but no judgment was entered by the trial or the appellate court incorporating the jury verdict, and making the jury verdict the verdict of the court. The Supreme Court did not render a judgment on the merits, it refused to review the Fifth Circuit decision reversing the JNOV.

Assignment of Error No. 2

New Trial

There are no specific provisions in Louisiana law that prohibit a trial court from granting a second new trial. *Carlone v. Carlone,* 444 So. 2d 1274, 1276 (La. App. 4 Cir. 1984). The trigger for filing a motion for new trial is the entry of judgment. La. Code Civ. Pro. art. 1974 (2008). The Louisiana Supreme Court has held that a judgment granting or denying a new trial is an interlocutory judgment. *State ex rel Land v. Martin,* 207 La. 410, 21 So. 2d 481, 482 (La. 1945). A final judgment determines the merits in whole or in part; an interlocutory judgment does not determine the merits, but only preliminary matters in the course of the action. La. Code Civ. Pro. art. 1841 (2007). Therefore, no interlocutory judgment can be a **final judgment on the merits** sufficient to invoke res judicata. *Id.* The two concepts are opposite. Res judicata does not apply to new trial orders. Res judicata requires a final judgment, and the commentary that accompanies La. R.S. § 13:4231 requires that the final judgment be rendered on the merits. La. R.S. § 13:4231 cmt. (d) (2007). This Court has held that the doctrine of res judicata is triggered **only** by a final judgment on the merits. *Tolis*, 95-1529, p. 2, 660 So. 2d at 1206, *citing* La. Code of Civ. Pro. art. 1841.

The Code of Civil Procedure allows for the filing of a motion for new trial within seven business days of the entry of a new judgment. La. Code Civ. Pro. art.

1974 (2008). The court signed a new judgment and used T&B's new form of judgment, at T&B's request, on September 4, 2007.[33] A motion for new trial was timely filed on September 5, 2007. The motion for new trial was set for hearing, was heard, and the opinion granting it fulfilled every requirement of the Supreme Court ruling in *Horton*.[34] The trial judge was absolutely clear that he did not believe that the jury did substantial justice herein, and that the jury verdict should not be the judgment of the courts of Louisiana. He had the right under the Code of Civil Procedure, *Horton* and *Carlone,* to grant a new trial from T&B's new judgment. His reasons are lengthy and more than adequately fulfill the requirements for a discretionary new trial as set out by this court in *Horton.*

There is no adequate justification for reversing the granting of a new trial herein.

CONCLUSION

The Fifth Circuit has erred in its application of res judicata to the case at bar. Its error conflicts with Louisiana's legislative intent as evidenced by our Codes and Statutes, and conflicts with prior expressions of the law by this Honorable Court and other circuits, and prior Fifth Circuit jurisprudence from

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[33] Exhibit F.

[34] Appendix 1.

other cases and from this case. Manifest injustice will be done if the Fifth Circuit decision is allowed to stand, which would deny applicants any right to appeal the adverse jury verdict herein.

Applicants respectfully request this Honorable Court to grant writs, to reverse and/or vacate the Fifth Circuit Judgment that reversed the trial court's grant of new trial, and to reinstate the trial court judgment that granted a new trial, as per *Horton v. Mayeaux.*

In the alternative, applicants request this Honorable Court to reverse and/or vacate the Fifth Circuit's judgment and to reinstate the trial court judgment of September 4, 2007, that incorporated the adverse jury verdict, and to reinstate plaintiffs' right to appeal the September 4, 2007 judgment.

Respectfully submitted,

/s/ Walter Dumas by CHD
WALTER DUMAS,
La Bar No. 5163
Dumas & Associates Law Corporation
The Lawyer's Complex
1261 Government Street
Baton Rouge, Louisiana
70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719
Attorney for Terrance Hayes

and

/s/ Thomas G. Wilkinson by CHD
THOMAS G. WILKINSON,
La. Bar No. 2184
MICHAEL P. CIACCIO,
La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

DIDRIKSEN LAW FIRM

/s/ Caleb H. Didriksen
CALEB H. DIDRIKSEN,
La. Bar No. 1334
DIANE R. COSENZA
La. Bar No. 4416
RICHARD J. GARVEY, JR.,
La. Bar No. 20822
LOYD J. BOUGEOIS, JR.,
La. Bar No. 29771
AMANDA K. WINGFIELD,
La. Bar No. 30800
3114 Canal Street
New Orleans, Louisiana
70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Attorneys for:

AXA GLOBAL RISKS (U.K.),
ALLIANZ INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYD'S
LONDON,
COMPAGNIE TRANSCONTINENTALE
DE REASSURANCE,

HOUSTON CASUALTY COMPANY,
LEXINGTON INSURANCE COMPANY,
MUNICH REINSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
QATAR INSURANCE COMPANY,
Q.B.E. INTERNATIONAL INSURANCE, LTD.,
SOREMA INSURANCE COMPANY,
SWISS REINSURANCE COMPANY,
WINTERTHUR INTERNATIONAL INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

Verification

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, personally came and appeared:

CALEB H. DIDRIKSEN

who, after being duly sworn, did depose and state:

That he is counsel for the plaintiff-applicant herein, that he has read the foregoing Application for Writs of Certiorari or Review, or Alternatively, Supervisory or Remedial Writs; that the allegations contained therein are true and correct to the best of his knowledge, information and belief; and that a copy of the Application (with Appendices) has been served by placing same in the United States mail, facsimile, or

other electronic means this 28th day of February, 2008:

Division D
23rd Judicial District Court
St. James Parish Courthouse
5800 LA 44
Convent, Louisiana 70723

Clerk of Court
Louisiana Fifth Circuit Court of Appeals
101 Derbigny Street
Gretna, Louisiana 70053

Counsel for Thomas and Betts:

Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
ADAMS & REESE
4500 One Shell Square
New Orleans, LA 70139

Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139

Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

/s/ Caleb H. Didriksen
Caleb H. Didriksen

Subscribed and sworn before me, Notary, this 28th day of February, 2008.

/s/ Loyd J. Bourgeois, Jr.
Loyd J. Bourgeois, Jr.

La. Bar. No. 29771
My commission is issued for life.

[SEAL] LOYD J. BOURGEOIS, JR.
Notary Public
State of Louisiana
Notary ID # 84815/La. Bar
No. 29771
St. Charles Parish

[Attachments Omitted In Printing]

SUPREME COURT OF LOUISIANA

Docket No. 2008 CC 481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

On application for Supervisory Writ of Certiorari or Review from the Fifth Circuit Court of Appeal for the State of Louisiana
Docket No. 07-C-893

On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

Motion for Rehearing
Filed on Behalf of Respondents/Appellants Terrance Hayes, Kaiser Alumina & Chemical Corporation/AXA Global Risks, et al.

Counsel for Kaiser/AXA:
Thomas G. Wilkinson
La. Bar No. 2184
Michael P. Ciaccio
La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

Counsel for
Terrance Hays
Walter Dumas,
La Bar No. 5163
Dumas & Associates
Law Corp.
The Lawyer's Complex
1261 Government Street
Baton Rouge, Louisiana
70821

Caleb H. Didriksen,
La. Bar No. 1334
Diane R. Cosenza,
La. Bar No. 4419
Richard J. Garvey, Jr.,
La. Bar No. 20822
Loyd J. Bourgeois, Jr.,
La. Bar No. 29771
Amanda K. Wingfield,
La. Bar No. 30800
DIDRIKSEN LAW FIRM
3114 Canal Street
New Orleans, Louisiana 70119
Tele: (504) 586-1600
FaX: (504) 822-3119

Counsel for Appellants, Terrance Hayes, AXA Global Risks (U.K.) et al, suing on their own behalf and in the name Kaiser Alumina & Chemical Corporation

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Exhibit B: Ruling of the Louisiana Fifth Circuit Court of Appeal in No. 07-C-893 (dismissal of Applicants' appeal due to lack of trial court judgment adopting the original jury verdict)

Exhibit C: Ruling of the Louisiana Fifth, Circuit Court of Appeal in No. 07-C-893 (reversing trial court's grant of a new trial and dismissing Kaiser/AXA and Hayes' appeal)

SUPREME COURT OF LOUISIANA

Docket No. 2008 CC 481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

On application for Supervisory Writ of Certiorari or Review from the Fifth Circuit Court of Appeal for the State of Louisiana
Docket No. 07-C-893

On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Applicants Terrance Hayes and Kaiser/AXA, through undersigned counsel, request that this Honorable Court reconsider its decision rendered May 2, 2008, which effectively denied the Applicants' due process right to appellate review of the jury's verdict in this matter, which was vacated by the trial court's judgment notwithstanding the verdict (JNOV) and reinstated upon reversal of the trial court's JNOV by the Louisiana Fifth Circuit Court of Appeal.

Applicants acknowledge that this Court's Rule IX, Section 6 prevents the use of rehearing when this Court has merely granted or denied an application for

writ of certiorari. However, in light of the violation of the Applicants' Due Process and Equal Protection rights afforded by both the United States Constitution and the Louisiana Constitution, this case warrants the extraordinary remedy of reconsideration by this Honorable Court. Chief Justice Calogero voiced his concerns regarding this issue in his reasons for granting Applicants' writ, stating "[n]o appellate court has yet examined the merits of the jury verdict," and that he would grant writ in this matter "to permit further proceedings, including an appeal therefrom." Chief Justice Calogero also noted that this Court did not address whether an appeal from the merits would lie from a reinstated jury verdict in *Vasalle v. Wal-Mart Stores, Inc.*, which is sufficient to grant writ in this matter in order to resolve ambiguity.

While the United States Supreme Court has long held that a "right" to appeal is not found in the United States Constitution, the Court has held that where a state provides a process of appellate review, the procedures must comply with the constitutional dictates of Due Process and Equal Protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The right of appeal is constitutionally guaranteed by the Louisiana Constitution. Art. VII, §§ 10 and 29; *Succession of Damico*, 109 So. 402 (La. 1925). Louisiana provides its process of appellate review in La. C.C.P. art. 2082:

> Art. 2082. Definition of Appeal
>
> Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court.

An appeal as such is the exercise of the constitutional right enjoyed by a litigant to have an adverse judgment of a trial court revised, modified, reversed or set aside by an appellate court. La. C.C.P. 2082. *Darouse et al. v. Andrew Mamon, Jr.*, 201 So. 2d 362 (La. App. 1 Cir. 1967).

> To dismiss an appeal is to refuse to entertain it. An appellate court may refuse to entertain an appeal (1) when it has no appellate jurisdiction therein; (2) when the appeal was not taken or perfected in time; (3) when the judgment below has been confessed or consented to; (4) when said judgment has been acquiesced in by voluntary execution thereof; (5) when the terms upon which the appeal has been granted have not been complied with; (6) when there is no appeal for want of an order granting an appeal; and (7) when the judgment, if definitive, has not been made executory by the signing thereof. La. Code Prac. art. 546; La. Code Prac. art. 567; La. Code Prac. art. 574; La. Code Prac. art. 587; and La. Code Prac. art. 593. But otherwise, in civil cases, an appeal lies of right from all final judgments, and also from such interlocutory judgments as may cause irreparable injury, La. Code Prac. art. 565, La. Code Prac. art. 566, La. Code Prac. art. 575,

> La. Code Prac. art. 578, La. Code Prac. art. 580, except in cases tried before a district court, in the country parishes, involving $ 100 or less, La. Const. art. VII, §§ 29, 48 (1921).

Succession of Damico, 161 La. 725 (La. 1925). As Justice Calogaro wrote in his dissent, the Fifth Circuit and this Court have now effectively violated Applicants' right to appeal an adverse verdict. Applicants have never had the right to have the adverse jury verdict reviewed by an appellate court, as is their constitutional right in Louisiana. On January 16, 2007, the Louisiana Fifth Circuit adjudged that Applicants did have a right to appeal, and that the appeal was premature because there was no trial court judgment adopting the jury verdict, as the prior judgment adopting the jury verdict had been vacated by the grant of a JNOV. The recent Fifth Circuit judgment dismisses the appeal without this ever being heard, along with the second new trial, in violation of Applicants' constitutional rights of Due Process and Equal Protection. This Court's failure to remedy the constitutional violations created by the Louisiana Fifth Circuit is a floodgate, which invites further dismissals of appeals in violation of both the United States and Louisiana's constitutions. This is the first case Applicants have located in which a party who timely took all reasonable steps to invoke their right of appeal has been denied any review by an appellate court of that adverse jury verdict. The trial court who swore in the jury and who presided over the trial believed this jury verdict to be so flawed that he granted a JNOV and granted new trials not

once, but twice. This flawed jury verdict has never been appealed, and without the assistance of this Court or of the United States Supreme Court, these litigants will be denied their constitutional right "to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." Justice Calogaro [sic] recognized the impact of these decisions on this $500 million dollar case. Applicants respectfully request a rehearing and another review and protection by this court of their constitutionally guaranteed right of appeal.

Respectfully submitted,

/s/ Walter Dumas by CHD
WALTER DUMAS, La Bar No. 5163
Dumas & Associates Law Corporation
The Lawyer's Complex
1261 Government Street
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorney for Terrance Hayes

and

/s/ T.G. Wilkinson by CHD
THOMAS G. WILKINSON,
La. Bar No. 2184
MICHAEL P. CIACCIO,
La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

DIDRIKSEN LAW FIRM

/s/ Caleb H. Didriksen

CALEB H. DIDRIKSEN,
La. Bar No. 1334
DIANE R. COSENZA,
La. Bar No. 4416
RICHARD J. GARVEY, JR.,
La. Bar No. 20822
LOYD J. BOUGEOIS, JR.,
La. Bar No. 29771
AMANDA K. WINGFIELD,
La. Bar No. 30800
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Attorneys for:
AXA GLOBAL RISKS (U.K.),
ALLIANZ INSURANCE COMPANY,
CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON,
COMPAGNIE TRANSCONTINENTALE
DE REASSURANCE,
HOUSTON CASUALTY COMPANY,
LEXINGTON INSURANCE COMPANY,
MUNICH REINSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE
COMPANY,
QATAR INSURANCE COMPANY,
Q.B.E. INTERNATIONAL INSURANCE,
LTD.,
SOREMA INSURANCE COMPANY,
SWISS REINSURANCE COMPANY,

WINTERTHUR INTERNATIONAL
INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing pleading has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 16th day of ~~February~~ May, 2008:

Division D
23rd Judicial District Court for the Parish of St. James
St. James Parish Courthouse
5800 LA 44
Convent, Louisiana 70723

Clerk for the Louisiana Fifth Circuit Court of Appeals
101 Derbigny Street
Gretna, Louisiana 70053

Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
ADAMS & REESE
4500 One Shell Square
New Orleans, LA 70139

Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139

Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

/s/ Caleb H. Didriksen
DIDRIKSEN LAW FIRM

List of all parties and counsel

For Applicants:

DUMAS & ASSOCIATES LAW CORPORATION
Walter Dumas, La Bar No. 5163
The Lawyer's Complex
1261 Government Street
P.O. Box Office 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Counsel for Terrance Hayes

and

Thomas G. Wilkinson, La. Bar No. 2184
Michael P. Ciaccio, La. Bar No. 21428
320 Huey P. Long Ave.
Gretna, Louisiana 70053
Telephone: (504) 364-1892
Facsimile: (504) 366-1519

DIDRIKSEN LAW FIRM
Caleb H. Didriksen, La. Bar No. 1334
Diane R. Cosenza, La. Bar No. 4416
Richard J. Garvey, Jr., La. Bar No. 20822
Loyd J. Bourgeios, La. Bar No. 29771
Amanda K. Wingfield, La. Bar No. 30800
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Counsel for:
AXA GLOBAL RISKS (U.K.),
ALLIANZ INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
COMPAGNIE TRANSCONTINENTALE
DE REASSURANCE,
HOUSTON CASUALTY COMPANY,
LEXINGTON INSURANCE COMPANY,
MUNICH REINSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
QATAR INSURANCE COMPANY,
Q.B.E. INTERNATIONAL INSURANCE, LTD.,
SOREMA INSURANCE COMPANY,
SWISS REINSURANCE COMPANY,
WINTERTHUR INTERNATIONAL
INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

For Respondents:

ADAMS & REESE
Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
4500 One Shell Square
New Orleans, LA 70139

GIEGER, LABORDE & LAPEROUSE, LLC
Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
4800 One Shell Square
New Orleans, LA 70139

SESSIONS, FISHMAN & NATHAN, LLP
Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

Counsel for Thomas & Betts

STATE OF LOUISIANA

PARISH OF ORLEANS

Verification

BEFORE ME, the undersigned notary, did come and appear:

Caleb H. Didriksen

who, after being duly sworn, did depose and say that he is counsel for a plaintiff-applicant herein, that he has read this motion for rehearing and that the allegations contained therein are true and correct to the best of his knowledge, information and belief; and

that a copy of this motion for rehearing and its attachments has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 16th day of May, 2008:

Division D
23rd Judicial District Court for the
Parish of St. James
St. James Parish Courthouse
5800 LA 44
Convent, Louisiana 70723

Clerk for the Louisiana Fifth Circuit Court of Appeals
101 Derbigny Street
Gretna, Louisiana 70053

Louis C. LaCour, Jr., Esquire
Raymond P. Ward, Esquire
ADAMS & REESE
4500 One Shell Square
New Orleans, LA 70139

Ernest P. Gieger, Jr., Esquire
Andrew A. Braun, Esquire
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139

Robert E. Winn, Esquire
Sharon Cormack Mize, Esquire
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500

/s/ Caleb Didriksen
DIDRIKSEN LAW FIRM
Caleb H. Didriksen

Sworn to and subscribed before me this 16th day of May, 2008

/s/ Amanda K. Wingfield
NOTARY PUBLIC
Amanda K. Wingfield
Bar No. 38000
My commission is for life

[Attachments Omitted In Printing]

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No. 08-139

Supreme Court, U.S.
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In The
Supreme Court of the United States

TERRANCE HAYES, KAISER ALUMINA AND CHEMICAL CORPORATION, AXA GLOBAL RISKS (U.K.), ET AL.,

Petitioners,

v.

THOMAS AND BETTS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for Kaiser/AXA:
CALEB H. DIDRIKSEN,
La. Bar No. 1334
Counsel of Record
DIDRIKSEN LAW FIRM
3114 Canal Street
New Orleans, Louisiana
70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

Counsel for Terrance Hayes:
WALTER DUMAS,
La. Bar No. 5163
DUMAS & ASSOCIATES LAW CORP.
The Lawyers Complex
1261 Government Street
Baton Rouge, Louisiana
70821
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Petitioners Terrance Hayes ("Hayes"), Kaiser Alumina and Chemical Corporation, and Kaiser's property insurers ("Kaiser/AXA") respectfully provide this Honorable Court with a Reply Brief in response to Thomas & Betts Corporation's ("T&B") Brief in Opposition to Petitioners' Writ of Certiorari to address the issue of this Court's jurisdiction over the case in question.

I. T&B's inaccurate version of the Statement of the Case purports to insert facts and conclusions that are not in the record.

T&B failed to follow Supreme Court rules in its statement of fact. Contrary to T&B's assertions, no jury form asked the jury to decide whether Kaiser had failed to properly maintain or use its own equipment. Therefore, there is no evidence that the jury's verdict was based on such a conclusion. Contrary to T&B's assertion, Kaiser did properly run and maintain its equipment, and T&B's product was used as exactly as indicated by T&B's own engineering literature. App. 1. We do not and cannot know why the jurors exonerated T&B but found the electrician and engineer who used the T&B product liable. T&B failed to follow Supreme Court rules by drawing its own erroneous and, with respect to the issues presented by this writ application, irrelevant, conclusions from the jury's verdict in this matter.

II. Petitioners properly raised a substantial federal question in the lower state courts.

T&B argues that this Court lacks jurisdiction to entertain Petitioners' Due Process and Equal Protection arguments because Petitioners allegedly failed to timely raise these arguments in the Louisiana Supreme Court in accordance with 28 U.S.C. § 1257(a) and *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). T&B's arguments fail to address the real issue – whether Petitioners were denied their right to appeal. Petitioners acknowledged in their recent writ application that while this Court has long held that there is no "right" to appeal explicitly enumerated in the United States Constitution, where a state provides a process of appellate review, the state's procedures must comport with the constitutional guarantees of due process and equal protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Louisiana guarantees the process of appellate review through its constitution, statutes, and case law.[1] Federal Constitutional law guarantees protection of those rights.

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[1] *Succession of Damico*, 109 So. 2d 402 (La. 1925), *citing* La. Const. art. VII §§ 29, 48 (1921), *Succession of Tullier*, 216 La. 821, 824 (La. 1950), *citing State ex rel. Durand v. Parish Judge*, 30 La. Ann. 282 (La. 1878), *First Nat'l Bank of Ruston v. Lagrone*, 164 La. 907, 114 So. 832 (La. 1972), *Pool v. Gaudin*, 207 La. 403, 21 So. 2d 424 (La. 1945, La. Code Civ. Pro. Ann. art. 2082 (2008).

T&B relies on *Cardinale* for its proposition that this Court may only grant writ to review a judgment of a state's highest court if the petitioner has properly raised and preserved a substantial federal constitutional issue in state court. 394 U.S. at 438. T&B alleges that the right to appeal, which is guaranteed to litigants by the state of Louisiana, is not protected by the United States Constitution. *Cardinale* does not apply to this case because it and its progeny present different legal issues. *Cardinale* and the cases that followed it involved petitioners who attempted to raise federal questions and new theories on appeal that were not previously raised in state court. *Id.*

In *Cardinale*, the petitioner was convicted of murdering a woman after having confessed upon his arrest. *Id.* at 437. The petitioner did not contend on appeal that his confession was involuntary or was not an admission of guilt. *Id.* at 438. In his writ application to this Court, the petitioner raised, for the first time, a challenge to the constitutionality of a state statute that required confessions to be admitted in their entirety, and argued that parts of his confession were irrelevant and prejudicial. *Id.* No state statute's constitutionality is being challenged herein for the first time on appeal. Petitioners, in the courts below and now in this Court, have consistently maintained that the failure of Louisiana's highest court to follow its own state statutes and prior jurisprudence constitute a violation of their right to appeal, which is by definition due process, and these rights are guaranteed

by the constitutions of both the United States and Louisiana.

In *Illinois v. Gates*, this Court noted that it would not allow new federal questions to be raised for the first time on certiorari to the United States Supreme Court, but acknowledged that assignments of error can be enlarged and considered in conjunction with arguments raised below:

> [W]e have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed on below. In *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899), the fullest treatment of the subject, the Court said that "[if] the question were *only an enlargement of the one mentioned in the assignment of errors*, or if it *were so connected with it in substance as to form* but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question of law to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."

462 U.S. 213, 220 (1983) (emphasis added). The *Gates* Court further noted, "[w]e have not attempted, and likely would not have been able, to draw a clear-cut line between cases involving only an "enlargement" of questions presented below and those involving entirely new questions." *Gates*, 462 U.S. at 220. In the

present case, Petitioners simply enlarged their arguments below regarding their right to appeal by reminding the Louisiana Supreme Court of the constitutional implications of their denial of writs in this matter, which ultimately denied Petitioners' right to appeal. There is no new argument in this matter that Petitioners have urged before this Court that they did not urge in the state courts below. Thus, this matter is distinguishable from cases such as *Cardinale*, where this Court has barred arguments *not previously raised* in state courts. *Compare Hill v. California*, 401 U.S. 797 (1971) (barring petitioner's argument that search and seizure of his diary that admitted his participation in the robbery violated his Fifth Amendment rights because he had not raised it below in state courts), *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) (barring petitioner's argument that the assessment amounted to a taking because the petitioner failed to raise this argument in conjunction with his argument that his due process rights were violated when he did not receive personal notice of assessment proceedings).

To determine whether a federal question was considered, this Court uses the "not pressed or passed upon below" rule. *United States v. Williams*, 504 U.S. 36 (1992). The failure of a party to present an error assigned to the court below constitutes an abandonment or waiver of all errors not assigned. *Old Jordan Mining & Mining Co. v. Societe Anoyme Des Mines*, 164 U.S. 261, 264 (1896).

The present case is not even marginally subject to the "not pressed or passed upon" below rule. The arguments pursued at the state level and with this Court are the same – whether Petitioners have been denied their right to appeal. Petitioners briefed the violation of their right to appeal in both the state intermediate court and the Louisiana Supreme Court every time a brief was filed. When the Louisiana Fifth Circuit Court of Appeal dismissed Petitioners' appeal on the basis of res judicata, it merely ignored its prior dismissal on the basis of prematurity and its instruction to the parties to cure the defect by having the trial court enter judgment incorporating the jury verdict as the JNOV had vacated the prior judgment that incorporated the jury verdict. T&B glosses over this prior dismissal on the grounds of prematurity, stating that the instruction to obtain a judgment from the trial court is *obiter dicta* and "language unnecessary to its decision." Opp. to Pet. 5.

This Court held in *Cohen v. Cowles Media Company* that "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and decided." 501 U.S. 663, 667 (1991). Cohen sued a Minnesota newspaper for breach of contract after it revealed him as a source, despite the newspaper's promises of confidentiality. *Id.* The newspaper defended itself on its right to free speech. *Id.* The lower court awarded Cohen damages and the state supreme court reversed and held that Cohen's breach of contract action was inappropriate, and

questioned whether Cohen could recover under a promissory estoppel theory that was never tried to a jury, or briefed or argued on appeal. *Cohen*, 501 U.S. at 667. This Court reversed, holding that "[t]he initial question we face is whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered." *Id.* In the present case, the issue before this Court is whether the denial of Petitioners' right to appeal constitutes "state action" within the meaning of the Fourteenth Amendment such that the protections of the Fifth and Fourteenth Amendments are triggered. U.S. Const. amend. V, XIV. Petitioners were not deprived of their constitutionally protected right to appeal until the Louisiana Supreme Court denied writs. At that point, the only procedural vehicle available to argue that Petitioners were denied their right to appeal was an application for rehearing directed to the court that had denied it. This is why the Petitioners first briefed the federal constitutional implications of the Louisiana Supreme Court's actions in an application for rehearing to that court. Chief Justice Calogero recognized the implication of the majority's opinion, and wrote a separate dissent to enumerate his concerns regarding Petitioners' right to appeal. App. 3-4. Justice Calogero wrote that he would have granted the writ: "I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict." App. 3. Justice Calogero would have granted the rehearing as well. App. 5.

No court may turn a blind eye to the United States Constitution. In *Indiana ex rel. Anderson v. Brand*, a public school teacher sought a writ of mandate to compel a school to enforce the terms of her contract, which had incorporated the terms of the Teachers' Tenure Act. 303 U.S. 95, 96-97 (1938). The Teachers' Tenure Act provided tenure to teachers who had served for five or more consecutive years. *Id.* at 97. The school demurred that the Teachers' Tenure Act had been repealed, which the lower court sustained, holding that the repeal did not deprive the teacher of a vested property right and did not impair her contract within the meaning of the constitution. *Id.* at 97-98. This Court held that it had jurisdiction to consider the case, despite the lower courts' decision that was based on an independent, non-federal ground. *Id.* at 98.

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the state has, by later legislation, impaired its obligations.

Id. at 100.

III. Petitioners' arguments in their motion for rehearing merely reiterated their claim that they were erroneously denied their right to appeal, and did not raise any issue not previously considered by the courts below.

T&B argues that rehearing was not a permissible vehicle for Petitioners to raise its arguments of due process and equal protection with regard to their right to appeal the reinstated jury verdict. To this end, T&B relied on *Radio Station WOW, Inc. v. Johnson* for the proposition that the Petitioners' due process argument could not serve as a basis for review by this Court when not raised in the state supreme court until in a petition for rehearing. 326 U.S. 120, 128 (1945). *Radio Station WOW* is an extremely convoluted case involving a radio station license and transfer of a radio station lease, and the power of the Federal Communications Commission to regulate that license and transfer. *Id.* at 121. The parties were embroiled in litigation that questioned the power of a state court to adjudicate this claim, which appeared to fall under the exclusive jurisdiction of the Federal Communication Commission, but this issue of whether the state court ever had jurisdiction to initially hear the matter was not raised until rehearing to the state supreme court. *Id.* at 128.

In the present case, the Louisiana Supreme Court clearly had jurisdiction to entertain this suit. Furthermore, as briefed for the Court above, there is no new question or issue raised in Petitioners' motion

for rehearing, which merely expressed Petitioners' claim to right of appeal is also protected by constitutional guarantees of due process and equal protection. Therefore, *Radio Station WOW* is not a proper analogy to the present case.

IV. The actions of the state courts in this case have resulted in the denial of the Petitioners' constitutionally protected right to appeal.

The action of Louisiana's Supreme Court has resulted in denial of Petitioners' constitutionally protected right to appeal. T&B erroneously relies on *Tolis v. Board of Supervisors of Louisiana State University* for the proposition that the final judgment of the Louisiana Fifth Circuit, which reversed the trial court's judgment notwithstanding the verdict and reinstated the jury's verdict, operates as a final judgment that reached the merits of the case and operated as res judicata to bar any future litigation in this matter. Opp. to Pet. 11, 95-1529 (La. 10/16/95), 660 So. 2d 1206. The crux of this issue is whether the reversal of the JNOV operates as a final judgment on the merits of a jury decision that had never been appealed. Petitioners note that T&B failed to address the implications of *Junot v. Morgan*, which ruled that an appealing party could not seek review of both a jury's verdict and a JNOV, because the JNOV vacated and *replaced* the jury's verdict. 2002-0237 (La. App. 1 Cir. 02/05/02), 818 So. 2d 152, 156-57. Chief Justice Calogero's dissent indicated that *Junot* would favor the case being remanded to the district court to enter

a judgment pursuant to the jury's verdict and permit further proceedings, including an appeal. App. 3-4. Petitioners further supported this argument with jurisprudence from other jurisdictions that embraced a rule similar to *Junot*. The applicable cases and statutes, none of which were discussed by T&B in its opposition, all favor a remand back to the trial court to permit further proceedings, including Petitioners' appeal. Petitioners respectfully request that this Honorable Court intervene to enforce Petitioners' constitutional safeguards, and to protect and preserve their right to appeal.

Respectfully submitted,

DIDRIKSEN LAW FIRM

CALEB H. DIDRIKSEN, La. Bar No. 1334
Counsel of Record
3114 Canal Street
New Orleans, Louisiana 70119
Telephone: (504) 586-1600
Facsimile: (504) 822-3119

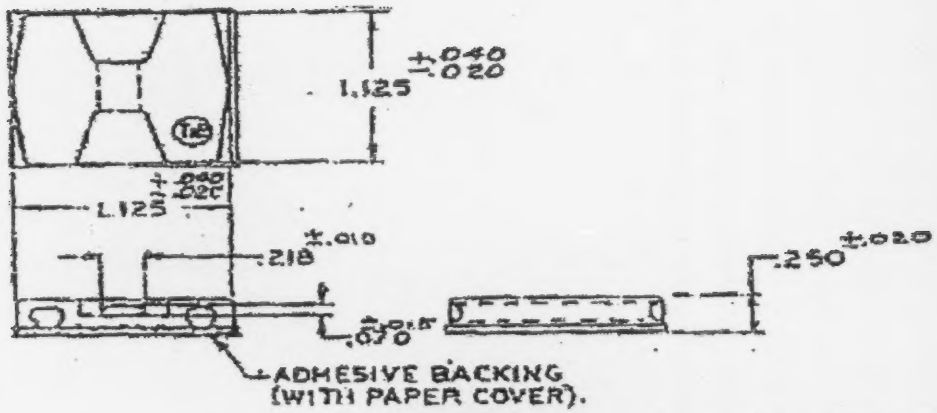
Attorney for:
AXA Global Risks (U.K.),
Allianz Insurance Company,
Certain Underwriters at Lloyd's, London,
Compagnie Transcontinentale De Reassurance,
Houston Casualty Company,
Lexington Insurance Company,
Munich Reinsurance Company,
National Union Fire Insurance Company,
Qatar Insurance Company,
Q.B.E. International Insurance, Ltd.,
Sorema Insurance Company,

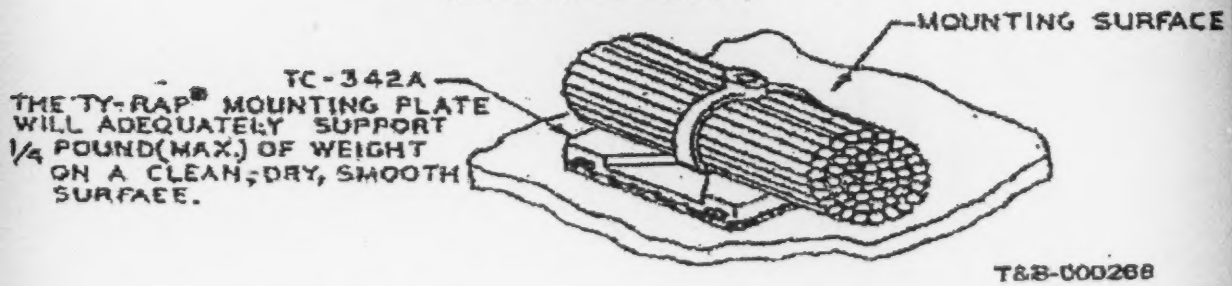
Swiss Reinsurance Company,
Winterthur International Insurance Company,
Zurich Reinsurance Company
in their own names and in the name
Kaiser Alumina & Chemical Corporation

and

WALTER DUMAS, La. Bar No. 5163
DUMAS & ASSOCIATES LAW CORPORATION
The Lawyer's Complex
1261 Government Street
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorney for Terrance Hayes


1.125
±.040
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L.125
±.010
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.250
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.070
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(WITH PAPER COVER).


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T&B-000268

The Supreme Court of the State of Louisiana

IN RE GRAMERCY PLANT EXPLOSION AT KAISER

NO. 2008-CC-0481

IN RE: Q.B.E. International Insurance Ltd.; Swiss Reinsurance Company; Zurich Reinsurance Company; Houston Casualty Company; Munich Reinsurance Company; Qatar Insurance Company; AXA Global Risks (U.K.) et al.; Sorema Insurance Company; Winterthur International Insurance Company; Certain Underwriters at Lloyd's London; Lexington Insurance Company; Kaiser Alumina & Chemical Corporation; Hayes, Terrance; National Union Fire Insurance Company; Compagnie Transcontinentale De Reassurance; Allianz Insurance Company; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

May 2, 2008

Denied.

JTK

CDK

BJJ

JPV

CDT

JLW

CALOGERO, C.J., would grant and assigns reasons.

Supreme Court of Louisiana
May 2, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2008-CC-0481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

ON APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH CIRCUIT, PARISH OF ST. JAMES

MAY 2 2008

[/s/ [illegible]] **CALOGERO, Chief Justice, would grant and assigns reasons.**

While the law appears not to be entirely clear on when an appeal on the merits may be taken after a JNOV and new trial are granted, but those rulings are later reversed and the jury verdict reinstated by the court of appeal, I would come down on the side of allowing the appeal at this juncture, if for no other reason than it seems no appellate court has yet examined the merits of the jury verdict. Furthermore, the cases that come close to addressing the issue either tend to support the applicants' position or are

inconclusive. *Junot v. Morgan*, 01-0237 (La. App. 1 Cir. 2/5/02), 818 So.2d 152, would favor the case being remanded to the district court to enter a judgment pursuant to the jury verdict and to permit further proceedings, including an appeal therefrom. And this court in *Vasalle v. Wal-Mart Stores, Inc.*, 01-0462 (La. 11/28/01), 801 So.2d 331, after reversing the JNOV and new trial order, simply reinstated the jury verdict, without any instruction to the district court; therefore, this court in *Vasalle* did not address whether an appeal on the merits might lie from the reinstated jury verdict.

The Supreme Court of the State of Louisiana

IN RE GRAMERCY PLANT EXPLOSION
AT KAISER

NO. 2008-CC-0481

IN RE: Hayes, Terrance, Kaiser Alumina & Chemical Corporation, AXA Global Risks (U.K.) et al; – Plaintiff(s); Applying for Reconsideration of this Courts order dated May 2, 2008; Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 07-C-893

June 20, 2008

Reconsideration denied.

BJJ

CDK

JPV

CDT

JTK

JLW

CALOGERO, Chief Judge, would grant.

Supreme Court of Louisiana

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court